IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

TABLE OF AUTHORITIES.

Cases.

Statute.

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Petitioner United Air Lines, Inc. (hereinafter "United") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered April 26, 1976 in Case No. 75-1481, *Carolyn J. Evans* v. *United Air Lines, Inc.*

OPINIONS BELOW.

The Memorandum Opinion of the District Court for the Northern District of Illinois dated April 9, 1975 is officially unreported, but is unofficially reported at 12 FEP Cases 287. A copy is appended hereto at Appendix, p. A1. The first opinion of the Court of Appeals dated January 29, 1976, is officially unreported, but is unofficially reported at 12 FEP Cases 288.

A copy is attached at Appendix, p. A3. The opinion of the Court of Appeals after rehearing is reported at 534 F. 2d 1247 (7th Cir., 1976). A copy is attached at Appendix, p. A13.

JURISDICTION.

The final judgment of the Court of Appeals was dated and entered April 26, 1976. Respondent's petition for rehearing was granted April 6, 1976. United's petition for rehearing with suggestion for rehearing *en banc* was denied June 7, 1976 (Appendix, p. A21). Jurisdiction is conferred on this Court by 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Does the reemployment of a former employee with new date-of-hire seniority under a neutral seniority system permit the resurrection of that employee's time-barred claim for loss of seniority and pay arising from termination of that employee's prior employment?

Are the collateral or lingering *effects* of a prior act of discrimination *in themselves* acts of discrimination against an employee, permitting the filing of a charge at any time in the future regardless of how long ago the prior act of discrimination occurred?

STATUTE INVOLVED.

Title VII of the Civil Rights Act of 1964 (hereinafter, the "Act"), 42 U. S. C. § 2000e, *et seq.*, specifically Section 706(d) thereof (42 U. S. C. § 2000e-5(d)).[1] Section 706(d) is set forth in its entirety at Appendix, p. A22.

1. Prior to the 1972 amendments (P. L. 92-261), the time within which charges were required to be filed was ninety days under Section 706(d) of the Act. Effective March 24, 1972, Section 706(d) was relettered 706(e) and the ninety days time limit within which to file charges was extended to 180 days. Evans' resignation and rehire in this case occurred before the 1972 amendments became effective.

STATEMENT OF THE CASE.

This is an action brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, *et seq.* by Carolyn J. Evans (hereinafter "Evans"), a former and subsequently rehired stewardess with United, to recover seniority and back pay lost as a result of her separation from employment as a stewardess in February of 1968. Jurisdiction was based on Section 706(f), 42 U. S. C. § 2000(e)-5(f), of the Act.

Evans was first hired by United as a stewardess in November, 1966. In February, 1968, Evans involuntarily resigned from United in anticipation of her marriage and pursuant to United's then-existing "no-marriage" rule that applied to stewardesses.[2] At the time of her resignation, all aspects of her employment relationship terminated, including seniority, pay, vacations, travel passes, etc. Evans did not protest her involuntary resignation or loss of these employment benefits by filing a charge with the Equal Employment Opportunity Commission ("EEOC") or any state agency at any time during the next four years.

On February 16, 1972, Evans applied and was accepted for employment by United as a new stewardess. She was sent to the same training school as other new hires and was graduated March 16, 1972. She commenced work as a new stewardess with a seniority date reflecting her date of hire in 1972, the same as other new hires with whom she graduated. In all respects, Evans was treated as a new hire and granted the same benefits and conditions of employment as other new hires.

On February 21, 1973, five years after her resignation in 1968 and approximately one year after her rehire as a new stewardess, Evans—for the first time—filed a charge of discrimination under Title VII complaining, in substance, that United unlawfully terminated her in February, 1968 and cur-

2. United discontinued its policy of requiring stewardesses to remain unmarried on November 7, 1968.

rently refused to restore to her the seniority she lost when her resignation was accepted in 1968. On August 29, 1974, the EEOC issued Evans a "right to sue" letter and, on September 4, 1974, this lawsuit was filed in the District Court.

In her complaint, Evans alleged that she had been discriminated against on the basis of sex when United, by reason of its "no-marriage" rule, forced her to resign her employment as a stewardess in 1968. Her complaint also alleged that the effects of this discriminatory discharge were continuing since United, when it subsequently hired her in 1972, hired her as a new employee with new seniority and did not restore her old seniority. Evans sought to avoid the application of any time limitations for her failure to file any previous charge of discrimination by asserting that, because of her new employment and the application of United's admittedly neutral date-of-hire seniority system which did not restore her previous seniority, she was suffering the effects of the 1968 discrimination and a "continuing" discrimination now existed.

United took the position that timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to filing a civil action under Title VII. Evans had not filed a charge of discrimination with the EEOC until February 21, 1973—five years after the termination of her prior employment and seniority—over four years after United eliminated its no-marriage rule—and a year after the commencement of her new employment and the assignment of a new seniority date. United moved to dismiss the complaint on the ground that Evans' claim for restoration of the seniority she lost in February, 1968 was untimely in that a charge should have been filed with the EEOC within ninety days of that loss, not five years later.

The District Court granted United's motion to dismiss. By memorandum opinion entered on April 9, 1975, the District Court concluded that "Evans . . . has not been suffering from any 'continuing' violation. She is seeking to have this court

merely reinstate her November, 1966 seniority date which she lost solely by reason of her February, 1968 resignation. . . . United's subsequent employment of plaintiff in 1972 cannot operate to resuscitate such a time-barred claim." (Appendix, p. A2.)

On appeal to the Court of Appeals, Evans took the position that the District Court erred in dismissing her Complaint since the violation complained about was allegedly a "current and continuing" violation of the Act; *i.e.*, Evans was presently holding a seniority position as a stewardess inferior to the seniority position she would have had if her 1966-68 seniority had been credited to her on rehire. In short, Evans continued to argue that the Company's action in requiring her to resign in 1968 was an unlawful act of discrimination and that United was and is, in her words, "unlawfully perpetuating the effects of that past discrimination, and is actively enabling that prior discrimination to reach effectively into the present."

Although having no right or entitlement in 1972 to reinstatement of her former employment, Evans claimed that once she was hired and resumed an employment relationship, this necessarily meant that she was then entitled to the seniority lost in 1968 and that no time limits whatsoever applied under the Act to bar her from filing a charge of continuing discrimination relating to the 1968 loss of seniority at any time in the future.

United's position before the Court of Appeals remained the same as presented to the District Court; *i.e.*, the actionable injury to Evans and the violation under the Act was Evans' termination from employment in February, 1968, when she lost her seniority and other benefits associated with that employment. It was from that date that the time limit for filing a charge began to run, and that time had long since expired.

On January 29, 1976, the Court of Appeals in a divided opinion affirmed the District Court's dismissal of the Complaint. The majority of the Court concluded that United's seniority

policy is not discriminatory in itself with respect to sex and that such a policy, which is neutral, cannot be said to perpetuate past discrimination, long since discontinued, in the sense required to constitute a "current" violation of Title VII. The majority of the Court stated (Appendix, pp. A9, A10):

> "If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termination alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period."

The dissenting judge disagreed, stating that he believed "continuing discrimination" to be present since failure to credit Evans with back seniority as a current employee gives "collateral effect" to the past act of discrimination.

On February 12, 1976, Evans petitioned the Court for a rehearing. The EEOC shortly thereafter filed a brief as *amicus curiae* in support of that petition. While the petition was pending, this Court issued its decision in the case of *Franks* v. *Bowman Transportation Co.*, ... U. S. ....., 96 S. Ct. 1251, 47 L. Ed. 2d 444, 44 U. S. L. W. 4356 (March 24, 1976). Evans filed a supplemental brief instanter on March 30, 1976 asserting that the *Franks* decision was of controlling guidance in support of her position. On April 6, 1976, the Court of Appeals granted Evans' motion for rehearing and on April 26, 1976 reversed its February 12 decision. Its reversal was based upon its interpretation of the *Franks* decision.

United petitioned the Court for rehearing with a suggestion for rehearing *en banc* on May 10, 1976. That petition was rejected June 7, 1976. United now brings this petition for a writ of certiorari.

REASONS THE WRIT SHOULD BE GRANTED.

The decision of the Seventh Circuit Court of Appeals, if left standing, effectively eliminates the time limitation set forth in Section 706(d) [now 706(e)] of the Act with respect to any claims of discrimination brought by employees, no matter how long after the act of discrimination occurred. If carried to its logical extreme, the decision establishes that the only requirement for a timely claim is that there presently is an employment relationship and that there are some "collateral effects" from a prior act of discrimination. This is true despite the fact that the policy of past discrimination has long since been discontinued.

The decision creates a conflict among the Circuits involving almost identical situations, *e.g.*, *Collins* v. *United Air Lines*, 514 F. 2d 594 (9th Cir., 1975), and represents a complete departure from the plain language of the Act which requires the filing of a discrimination charge within the statutory period after the alleged unlawful act or practice occurred—not years later merely because some collateral or lingering effects remain.

Further, the decision was issued based upon an erroneous interpretation of this Court's decision in the *Franks* case. In *Franks*, this Court held that Section 703(h) of the Act and a bona fide seniority system does not preclude *as a matter of remedy* the grant of retroactive seniority in a *timely filed* class action. The decision in *Evans'*, however, is authority for a different proposition; *viz*, that a claim of discrimination is *timely filed* if a bona fide seniority system carries forward some effects of an otherwise time-barred act of discrimination. The routine operation of a completely neutral date-of-hire seniority system is, therefore, permitted to convert a barred claim of discrimination into a current continuing violation permitting the filing of a charge at any time—a result clearly never contemplated by this Court in *Franks*. For these reasons the writ should be granted.

I.

The Time Limit of Section 706(d).

Section 706(d) of the Act is clear and unambiguous. Prior to the 1972 amendments of the Act, Section 706(d) provided that charges of discrimination in a state which did not have a law banning such discrimination must be filed within ninety days of the act of discrimination.[3] As stated in Section 706(d):

> "A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred. . . ."

The only change made by the 1972 amendments to the quoted language was to enlarge the ninety day period to 180 days.

It is settled law that fulfillment of the above requirement is a jurisdictional prerequisite to the filing of a lawsuit. The Court of Appeals for the Seventh Circuit recognized this in the case of *Choate* v. *Caterpillar Tractor Company*, 402 F. 2d 357, 359 (7th Cir., 1968) wherein the court stated:

> "The requirement that a complainant must invoke the administrative process within the time limitations set forth in Section 706(d) is a jurisdictional precondition to the commencement of a court action."

This Court, in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), agreed when it stated, in the language of Mr. Justice Powell, at p. 47, that the Act:

> ". . . specifies which precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue 42 U.S.C. §§ 2000e-5(b), (e) and (f)".

3. Illinois law did not cover sex discrimination in 1968.

To the same effect is *McDonnell Douglas Corp.* v. *Greene*, 411 U. S. 792, 798 (1973).

Other Circuits are in accord that the time limits in Title VII must be complied with to confer jurisdiction; see, *e.g.*, *Griffin* v. *Pacific Maritime Assoc.*, 478 F. 2d 1118 (9th Cir., 1973), *cert. denied*, 414 U. S. 859; *East* v. *Romine, Inc.*, 518 F. 2d 332, 336 (5th Cir., 1975); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1231 (8th Cir., *en banc* 1975); *Revere* v. *Tidewater Tel. Co.*, 485 F. 2d 684 (4th Cir., 1973) and *Greene* v. *Carter Carburetor Co.*, 532 F. 2d 125 (8th Cir., 1976). Also, *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F. Supp. 195 (W. D., Va., 1969) and *Gordon* v. *Baker Protective Services, Inc.*, 358 F. Supp. 867 (N. D., Ill., 1973).

II.

The Act of Discrimination in This Case Occurred in February, 1968.

United's seniority system, as it pertains to United's stewardesses, is a commonly used system whereby stewardesses begin to accrue seniority when they commence work and lose seniority when they leave the company. Seniority rights, along with other perquisites of employment such as wages and fringe benefits, are derived from the employment relationship and the collective bargaining agreement covering the rules, rates of pay and working conditions of stewardesses.

When Evans was first employed by United in November, 1966, she began to accrue seniority and by the time of her resignation in February, 1968, had accrued approximately 16 months' seniority. When she resigned in February, 1968, her seniority terminated, as did the other perquisites of the employment relationship. She then became, employment-wise, a member of the general public and stood on the same footing as

other members of the general public, with the sole exception that she possessed a right, for ninety days, to file a charge with the EEOC protesting her involuntary resignation and the accompanying loss of her seniority, wages, travel passes, etc. At the expiration of ninety days, she possessed no rights whatsoever to challenge the loss of that seniority and other employment benefits.

Before her employment by United as a "new" stewardess in 1972, Evans had no right of reinstatement to her former employment. Similarly, upon her new employment, she had no claim or rights arising out of her former period of employment since her claim to any such rights had long expired. It was not until one year after she was reemployed in 1972 that Evans first claimed that the seniority she accrued between November, 1966 and February, 1968, should be added to her new seniority in 1972.

It is evident that the act of discrimination of which Evans complains occurred in February, 1968, for that is the time she lost the 16 months' seniority which she now claims. As a new employee in 1972, she clearly had no more right to 16 months' added seniority than any other new hire. The only basis on which she claims such added seniority arises from her prior employment—but all claims arising from that period of employment were barred ninety days after her resignation in 1968. Once barred, they could not be resurrected. Yet, this is precisely what the Court of Appeals permitted in this case—solely because of her reemployment.

III.

Evans' Termination of Employment in 1968 Constituted a Final Act and No "Continuing Violation" Is Involved in This Case.

Virtually every court which has had occasion to pass on the question has held that a termination of employment is a "final act" and not a continuing violation. As aptly stated in *Phillips*

v. *Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 537-8 (D. C. W. Va. 1972), affirmed without opinion 474 F. 2d 1342 (4th Cir., 1973):

> "It is clear that the unlawful discriminatory practice complained of by plaintiff arises out of the termination of his employment on September 25, 1969. Although plaintiff has alleged a continuing practice of discrimination in his complaint, the record before this court, aside from plaintiff's pleadings, establishes only this single act which could arguably be considered an unlawful employment practice. Plaintiff attempts to avoid the limitation period set forth in Section 706(d) by asserting that the discriminatory practice continued until July 7, 1970, when a negro was hired as his replacement. The record establishes, however, only a single act, occurring on September 25, 1969, which conceivably could form the basis of a charge under the Civil Rights Act of 1964. To hold that the alleged discriminatory termination of plaintiff's employment constituted a continuing practice of discrimination would be to negate reality. • • •"

In *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1234 (8th Cir., 1975), the Court of Appeals for the Eighth Circuit stated that:

> ". . . Termination of employment either through discharge or resignation is not a 'continuing' violation. . . ."

This Court, in *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 95 S. Ct. 1716 (1975), recently recognized that time limits for protesting discharges are counted from the date of discharge. In *Johnson*, the petitioner was discharged on June 20, 1967. Some three and one-half years later, petitioner brought court action under the Civil Rights Act of 1866, 42 U. S. C. § 1981, alleging that he was discriminated against on the basis of his race when discharged. Since the action took place in the State of Tennessee, a one year statute of limitation was applicable to actions brought under 42 U. S. C. § 1981. Rejecting the argument that petitioner's failure to file his suit

within the one year limit was excused because he had filed a timely charge under Section 706 of the Civil Rights Act of 1964, this Court stated, 421 U. S. 462-3:

> "The cause of action asserted by petitioner accrued, if at all, *not later than June 20, 1967, the date of his discharge.* Therefore, in the absence of some circumstance that suspended the running of the limitation period, petitioner's cause of action under § 1981 was *time-barred* after June 20, 1968, over two and one-half years before petitioner filed his complaint." (Emphasis added.)

Significantly, this Court did not hold that petitioner's charge was timely because he "continued" to suffer the effects of his discharge. It was the act of discharge on June 20, 1967 which began the running of the applicable time limit and petitioner's claim was time-barred as a result of his failure to meet that limitation.[4]

In *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806, 808 (7th Cir. 1975) the Court of Appeals stated:

> ". . . If they [plaintiffs] believed that their termination was the result of unlawful discriminatory practices, then a charge was required to be filed within ninety days of that termination. Although the plaintiffs contend that the ninety-day limitation period is no bar because the discrimination is continuous in nature, this is not the case once employment has ended. • • •
>
> . . . For such a former employee the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date. . . ."

4. See also *Revere* v. *Tidewater Telephone Co.*, 485 F. 2d 684 (4th Cir., 1973) affirming the District Court's denial of jurisdiction for failure of a discharged employee to file his charge with the EEOC within ninety days, *Buckingham* v. *United Air Lines, Inc.*, ... F. Supp. ....., 11 FEP Cases 344, 349 (C. D. Cal. 1975), *Higginbottom* v. *Home Centers, Inc.*, ... F. Supp. ....., 10 FEP Cases 1258, 1260 (N. D. Ohio, 1975); *Doski* v. *M. Goldseher Co.*, ... F. Supp. ....., 11 FEP Cases 468, 470 (D. Md. 1975); *Guy* v. *Robbins & Myers, Inc.*, 525 F. 2d 124 (6th Cir. 1975), *cert. granted* 44 U. S. L. W. 3608 (April 27, 1976) and, in particular, *Kennedy* v. *Braniff Airways, Inc.*, 403 F. Supp. 707 (N. D. Tex. 1975), a case strikingly similar to *Evans*, wherein similar allegations were rejected.

In *Collins* v. *United Air Lines, Inc., supra,* the Court of Appeals for the Ninth Circuit ruled, in a case involving another United stewardess who resigned because of the same "no-marriage" rule, that her lawsuit was barred because of her failure to file charges with the EEOC within ninety days of her resignation.

Except for the fact that Evans was employed as a new stewardess several years after her original employment ended whereas Collins was not, the fact situations in the two cases are almost identical. Both plaintiffs were stewardesses hired by United prior to 1968. Both resigned involuntarily because of United's no-marriage rule—Collins in 1967 and Evans in 1968. Neither filed a charge protesting her termination within ninety days following the termination. In Collins' case, she first filed her charge in 1971, some four years after her termination. In Evans' case, she first filed her charge in 1973, five years after her termination. Both Evans and Collins contended their charges were timely filed because the alleged violations were "continuing" in that United had continually denied to them the privileges and benefits of employment, including prior employment seniority.

The Court of Appeals in *Collins* ruled that her charge was untimely filed since she did not file it within ninety days of her resignation. The Court of Appeals in *Evans* ruled that Evan's charge was timely even though she failed to file it within ninety days of her resignation. Answering the contention that the violation was "continuing", the Court in *Collins* said (514 F. 2d at 596):

> "We cannot accept Collins' argument that her continuing nonemployment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, it is the alleged unlawful act or practice—not merely its effects—which must have occurred within the 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period."

Clearly, the construction placed upon Section 706(d) by the Court in *Evans* differs from the construction placed upon that same section by the Court in *Collins*. Yet, the sole difference in their situations is that Evans was rehired whereas Collins was not.

The argument that the *effects* of a past act of discrimination rather than the act of discrimination itself constitutes a new or continuing violation of Tilte VII, as rejected in *Collins, supra,* was similarly rejected in a very recent decision of the U. S. District Court for the Southern District of New York. In *Cates* v. *Trans World Airlines,* ..... F. Supp. ....., 13 FEP Cases 201 (S. D., N. Y., July 22, 1976), a pilot employee claimed that he would have had higher seniority benefits and standing but for the fact that his employer had a previous discriminatory policy against hiring black pilots. In 1972, some six years after his employment took place in 1966, he filed a charge with the EEOC for the first time contending, as does Evans here, that he was suffering the current effects of a prior act of discrimination. Specifically, he contended that the failure of TWA to hire him earlier caused him to occupy a lower seniority status and to have fewer benefits than he would have had if hired prior to 1966. The Court rejected the argument that the presence of the continuing "effects" constituted new and separate events of discrimination for which a new charge of discrimination could be timely filed. As stated by the Court (13 FEP Cases at 209):

> ". . . While Whitehead has not alleged that he was denied some benefit traceable to his low seniority status within 180 days of the filing of charges with the EEOC, the Court will construe his complaint so as to make such an allegation. Still, this does not help him state a timely claim for relief. The monthly allocation of seniority benefits pursuant to a facially neutral, date-of-hire seniority system is not the event by which an unlawful employment practice occurs for the purposes of triggering the 180 day limitations period in which to file charges. Any detriments which he may have suffered during this period are not in and of

> themselves fresh acts of discrimination, but are only the derivative effects of the prior policies as carried forward by the seniority system. As a case like Collins makes clear, it is the unlawful *act* or *practice* and not merely its effects which must occur within the 180 day period prior to the filing of charges with the EEOC."

IV.

The Fact That Evans Was Rehired Does Not Resurrect Her Time-Barred Claim—Franks v. Bowman Is Inapposite.

In its initial decision, the Court of Appeals in *Evans* recognized that Evans had been rehired by United before she filed her charge with the EEOC but held that nonetheless her claim was barred by time limits because she had not filed it within the time specified in the Act. As correctly stated by the Court in its initial decision (Appendix, pp. A9, A10):

> ". . . If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termination alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period."

The cases discussed above in this brief, including *Collins, supra* and *Terry, supra,* establish that a termination is a final act and is not a continuing violation of the Act. Therefore, as the Court of Appeals correctly held in its initial decision, any claim she had "relating to the termination" would be barred.

After the Court of Appeals received and interpreted this Court's decision in *Franks* v. *Bowman Transportation Co., supra,* it reversed its ruling. In its second and final decision in *Evans,* the Court's reliance on *Franks* was made clear. The Court said (534 F. 2d at 1250):

> "It is in the context of the *Franks* decision that we must consider whether Evans' complaint was filed within 90 days of a violation of Title VII, thus affording jurisdiction

> to the district court. More specifically, the issue is whether . . . [Sec. 706(h)] may be used to interpose a legal bar to Evans' theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuous violation of her Title VII rights."[5]

The Court of Appeals construed *Franks* as requiring the finding that the operation of a neutral date-of-hire seniority policy to a rehired employee necessarily constitutes a current or continuing violation of the Act if the effects of some prior act of discrimination, a charge as to which act in itself has been time-barred, are carried forward. In so reading *Franks*, the Court of Appeals was in error.

Franks has no application to the real question at issue. *Franks* simply stands for the proposition that a federal court has power to *remedy* an act of discrimination by an award of retroactive seniority to the victim of discrimination *in a situation in which the time limits for filing the complaint are met and the court has jurisdiction. Franks* does not stand for the proposition that a federal court has jurisdiction over claims *in which the time limits of the Act were not met.* In *Franks*, retroactive seniority was authorized for members of a class in which the named plaintiffs had filed a timely charge. In *Evans*, no timely charge was filed. Thus, the District Court in *Evans* did not have jurisdiction over her claim to seniority arising out of her 1966-68 employment. *Franks* is inapposite.

As applied to Evans herself, it is not unreasonable to require that she should have taken timely steps at the time of her termination to protect her rights. It was at that point, in actually losing her job and seniority, that the "act" of discrimination occurred—the date the no-marriage rule was applied to her. It was at that point at which it could reasonably be

5. United never raised the defense that Section 706(h) barred Evans' claim. It had no need to do so since Section 706(d), correctly interpreted, provided a complete defense. The Court of Appeals inserted the Section 706(h) argument as an issue, then decided that issue against United.

expected that she would have sought remedial action if she felt she had been treated unfairly. Moreover, despite the discontinuance of the no-marriage rule by United in November, 1968 and despite her employment as a new hire with new date-of-hire seniority in February, 1972, Evans still failed to file any claim until almost one year later. With ample opportunity to file a claim—with over five years passing since her termination and the loss of her former seniority—and *with no ongoing pattern and practice of discrimination,* it is unreasonable to so loosely construe the "continuing discrimination" concept as to permit Evans to resurrect those claims that were clearly time-barred.

If the Court of Appeals' broad extension of the "continuing discrimination" concept in *Evans* were to receive acceptance, then *any* present employee who was discriminated against in the past could wait indefinitely and file a charge any time in the future—whether five, ten, fifteen or more years later, for he would meet the criteria of *Evans* of being an employee who could be in the position of always suffering the effects of a past action of discrimination. The time limits specified in Section 706 of the Act would be meaningless.

To illustrate: Assume that an employee was discriminatorily laid-off in 1970 and remained in such status for three years. He returns to active employment in 1973 and remains an employee for thirty years thereafter and, at the end of thirty years, first files a charge of discrimination with the EEOC. (Evans waited one year after her return to employment.) He claims a continuing adverse effect on his pay and seniority up to the present time since under the employer's neutral seniority system, one used by almost all employers, he did not receive seniority credit for the period of his lay-off. Under such a seniority system and under the *Evans* decision, his charge presumably would be timely for he would be currently suffering the "collateral effects" (lower rated seniority, pay, etc.) of a past act of discrimination.

Similarly, assuming that an employee was discriminatorily denied a transfer to a higher rated position in 1970, but remains an employee for thirty years thereafter and, at the end of thirty years, first files a charge of discrimination with the EEOC, his charge presumably would be timely under the *Evans* decison for he would be currently suffering the "collateral effects" (lower rated position) of a past act of discrimination.

The above examples are illustrative. The fact, however, is that in such cases and others, any period of limitations for Title VII action under Section 706 would be completely eliminated if the *Evans*' rationale were accepted. Clearly, Congress intended no such result.

Doubtless, every past act of discrimination has some future impact and continuing effects. As applied to Evans, although she now claims that because of her prior termination from employment a continuing adverse effect on her present pay and seniority exists, she is, in truth, suffering from fewer adverse effects than *Collins* or *Terry* who were not rehired and whose claims are barred. *Evans,* thus, results in a situation in which a former employee who is rehired and again begins to draw wages, fringe benefits and the like is given a right to the benefits of her past employment despite her five year delay in filing a charge, whereas a former employee who is not hired and remains adversely affected has no such rights.

The net effect of the Court of Appeals' final decision in *Evans* is to create *different* rights under the Act for former employees who are rehired and former employees who are not rehired. Those who are not rehired lose any claims based upon their former employment relationship unless they asserted such claims within 90 days as provided in Section 706(d). Those who are rehired have the right, under the *Evans* rationale, to assert such claims even though such claims were barred by Section 706(d) several years prior to rehire. In short, *Evans* means that the act of rehiring a former employee resurrects or revitalizes a claim already barred by time limits.

This result is illogical and without support in the law. It obviously will not foster reemployment of former employees by employers, but will discourage reemployment.

Section 706(d) draws no distinction between claims by present employees and claims by former employees. Nothing in Section 706(d) permits claims to be asserted by present employees unless those claims were filed within the ninety day period from the date the act of discrimination occurred. In fact, Section 706(d) bars *all* claims not filed within ninety days, whether by present employees or not. There is no valid basis in the Act from which to draw a distinction in the application of Section 706(d) between present and former employees.

The error in *Evans* is that the Court of Appeals confuses the continuing *effects* of an act of discrimination with the *act* of discrimination itself. It does so in a situation wherein the act of discrimination was a definite and completed act, where there was a complete break in the employment relationship, where the underlying discriminatory policy has long been discontinued and there is no ongoing pattern or practice of discrimination, and where the aggrieved employee had more than ample opportunity to timely assert a claim but chose not to do so. It represents authority for the proposition that claims under Title VII, although previously barred by the time limitations under the Act, can at any time be "unbarred" by the mere fact of subsequent employment and the application of a completely neutral employment policy, such as United's date-of-hire seniority system. As a result, it creates a license for an aggrieved person, irrespective of when the alleged discrimination occurred, to wait years before asserting a claim of discrimination, as did Evans. It eliminates any period of limitations for Title VII actions.

CONCLUSION.

Evans is illogical, contrary to the language of Section 706(d) of the Act and the intent of Congress. It is contrary to the ruling of the Court of Appeals for the Ninth Circuit in *Collins*

and contrary to those decisions which hold that filing of a charge with the EEOC within the time limits set forth in the Act is a jurisdictional prerequisite to the filing of a lawsuit.

Evans confuses the "effects" of an act of discrimination with the "act" of discrimination itself and by so doing would permit any current employee who has at any time in the past been the victim of an "act" of discrimination to have a current timely charge relating to that act since that employee can be in the situation of perpetually suffering the "effects" of the act, no matter how long ago the act occurred—whereas a non-rehired former employee who also was the victim in the past of the same act of discrimination and is currently suffering the "effects" of that act (unemployment) has no similar right.

Evans misconstrues *Franks* and interprets it incorrectly as authorization to remedy time-barred claims of discrimination rather than as authorization to remedy timely claims of discrimination. *Evans* improperly permits an employee who is rehired to resurrect a barred claim, even though there is no authorization in the law to permit such action.

Were *Evans* permitted to stand, employers would be discouraged from rehiring former employees for fear that barred claims of past discrimination would be resurrected, as indeed occurred in Evans' case.

For the foregoing reasons, United respectfully prays that a writ of certiorari be issued.

Respectfully submitted,

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Dated: September 3, 1976.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois
Eastern Division.

CAROLYN J. EVANS, *Plaintiff,*
vs.
UNITED AIR LINES, INC., *Defendant.*
No. 74 C 2530

MEMORANDUM OPINION.

Plaintiff employee has filed this action against defendant employer under Title VII of the Civil Rights Act of 1964 to seek redress for defendant's alleged illegal sex discrimination. Plaintiff complains that she was forced to resign her position as a stewardess in February, 1968, pursuant to United's "no marriage" rule for female flight personnel. In November, 1968, United ended its "no marriage" policy, and in February, 1972, plaintiff was hired by United as a stewardess. On February 21, 1973, plaintiff, for the first time, filed a charge of discrimination against United with the EEOC. In response, the EEOC issued a right-to-sue letter to plaintiff, who then filed this action.

Pursuant to F. R. Civ. P. 12(b)(1), defendant has moved to dismiss the complaint on the ground that this court is without jurisdiction in this case under Title VII because of plaintiff's failure to file charges with the EEOC within a certain specified period of time from the date of the alleged unlawful discrimination.

Prior to the 1972 Amendments to the Act, when plaintiff was forced to resign her position, § 2000e-5(d) provided that

in order to bring an action under this section, a person must file a charge with the EEOC within ninety days after the occurrence of the alleged unlawful employment practice.[1] Plaintiff waited five years before filing her charge. The requirement that one complaining of discrimination on the basis of sex must invoke the administrative process within the time limitations set forth in 42 U. S. C. § 2000e-5 is a jurisdictional precondition to the commencement of a court action. *Choate* v. *Caterpillar Tractor Company*, 402 F. 2d 357, 359 (7th Cir. 1968). Plaintiff agrees, but argues that in this case there exists a "continuing violation" brought about by United's current refusal to credit plaintiff with any seniority prior to her employment in February, 1972. Plaintiff asserts that by defendant's denial of her seniority back to the starting date of her original employment in 1966, United is currently perpetuating the effect of past discrimination.

Plaintiff, however, has not been suffering from any "continuing" violation. She is seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation. The fact that that resignation was the result of an unlawful employment practice is irrelevant for purposes of these proceedings because plaintiff lost her opportunity to redress that grievance when she failed to file a charge within ninety days of February, 1968. United's subsequent employment of plaintiff in 1972 cannot operate to resuscitate such a time-barred claim.

Accordingly, defendant's motion to dismiss is granted, and the complaint is hereby dismissed.

ENTER:

/s/ BERNARD M. DECKER,
United States District Judge.

Dated: April 9, 1975.

1. By Act of March 24, 1972, Pub. L. 92-261, § 4(a), 86 Stat. 103, former subsection (d) was relettered to (e), and the time for filing charges was extended from ninety days to one hundred and eighty days.

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1481

CAROLYN J. EVANS,

Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois.

74-C-2530

BERNARD M. DECKER, *Judge*

Argued November 6, 1975—Decided January 29, 1976

Before CUMMINGS, ADAMS,* and SPRECHER, *Circuit Judges.*

PER CURIAM:—This suit was brought by Carolyn J. Evans, under Title VII of the Civil Rights Act of 1964,[1] to recover seniority and back pay that she claims she has lost because of her separation from employment with United States Air Lines. The complaint alleged that United discriminated against Evans

* The Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

1. 42 U. S. C. § 2000e *et seq.* (Supp. III 1973).

in February, 1968, when United, by reason of Evans' marriage forced her to resign her employment as a stewardess, and that the effect of the termination is a continuing one, perpetuated by the current policies of United which for seniority purposes consider only continuous time in service.

Evans was employed by United as a stewardess from November, 1966 until February, 1968, when she involuntarily resigned. During that period it was the policy of United that marriage disqualified a woman from continuing her employment as a stewardess. On November 7, 1968, United discontinued its policy of requiring stewardesses to remain unmarried,[2] and on February 16, 1972, Evans was again hired as a new employee of United. She was provided stewardess training for newly hired employees which she completed on March 16, 1972.

Evans' charge of discrimination was filed with the EEOC on February 21, 1973—five years after her termination from employment, and more than four years after United eliminated its no-marriage rule. She had not filed any prior charge of discrimination with the EEOC, or with any other governmental agency, or in any way challenged United's no-marriage rule.

2. United, by letter agreement of November 7, 1968 with a collective bargaining agent, agreed to reinstate those stewardesses who had been terminated under the no-marriage rule and who had filed charges or grievances. Every stewardess desirous of reinstatement was required to make application within thirty days of notification of this agreement. Evans did not qualify for reinstatement under this agreement because she had not filed a prior charge of discrimination against United with the EEOC or any state agency, nor had she filed a grievance under the applicable collective bargaining agreement.

By an October 16, 1969 letter agreement United undertook to reinstate those stewardesses who had transferred to ground positions because of the no-marriage rule and who were employed by United on that date. Evans acquired no right under the letter agreement of October 16, 1969 inasmuch as she had not transferred to a ground position and was not an employee with United as of October 16, 1969.

United's no-marriage policy for stewardesses was held unlawfully discriminatory in Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 3 FEP Cases 621 (7th Cir.), *cert. denied*, 404 U. S. 991 (1971).

United took the position that a timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to filing a civil action under Title VII. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357, 359, 1 FEP Cases 431, 433, 69 LRRM 2486 (7th Cir. 1968). Therefore it moved to dismiss the complaint on the ground that Evans had failed to file a charge with the EEOC within ninety days of the alleged unlawful practice[3] which occurred in February, 1968, United claimed, when Evans was forced to resign as a stewardess and her employment and seniority were terminated. The district court granted United's motion to dismiss the complaint on the ground that plaintiff "has not been suffering from any 'continuing' violation" and is "seeking to have the court merely reinstate the November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation."

Evans appeals and we affirm.

I.

Evans claims that a current employment practice or policy, though facially neutral, is unlawful if by its operation it enables prior discrimination to reach into the present, and thus prolongs the effect of such prior discrimination. She also contends that where the challenged employment practice is current and continuing, the usual procedural requirement of Title VII, that an EEOC charge "be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," is inapplicable. Evans appears to argue that where the practice is a persistent one, a charge filed at any time during the practice's continuance is *ipso facto* timely.

Her charge would not be timely and the jurisdictional prerequisites to a civil action would not be fulfilled under the Civil

3. Prior to the 1972 Amendments of the Civil Rights Act, 42 U. S. C. § 2000e-5(e) provided that in order to bring an action under this section, a person must file a charge with the EEOC within ninety days after the occurrence of the alleged unlawful employment practice.

Rights Act, Evans concedes, unless her theory of a continuing violation is valid. Evans also concedes that United's current seniority policy is facially neutral with respect to sex,[4] and she does not contend that United still discriminates against females by reason of any current no-marriage policy. She does maintain however, that United's discriminatory termination in February, 1968 caused her to lose her seniority and, as a result of both that termination and United's on-going seniority policy, she suffers a discriminatory loss of seniority and related benefits, including pay, to the present date.

On the other hand, United asserts that the only legally cognizable injury to Evans was her termination of employment and seniority in February, 1968. That she was subsequently hired as a new employee cannot alter the fact, United asserts, that Evans lost her former seniority when she was terminated. It was this termination, in 1968, which began the running of the time limit with respect to the loss of her employment and associated benefits, according to United's theory of the case.

United argues that if a discriminatory act is considered to continue for so long as there is some lingering effect, every alleged discriminatory act could be litigated at any time. An alleged discrimination, United reasons, would never be final, despite the limitation period under section 2000e-5(e), since there might always be some lingering effects—monetary or otherwise.

II.

In *Collins* v. *United Airlines*, 541 F. 2d 594 (9th Cir. 1975), decided after the judgment here was entered by the district court, the plaintiff, a stewardess for United, was required

4. United's policy of crediting toward seniority only *continuous* time in service works to the disadvantage of rehired employees. A new employee who was hired in the interim between the rehired employee's termination and rehiring will have greater seniority than the rehired emlpoyee, although the new employee may have less total time in service. This policy would seem to be neutral, however, as between male and female employees.

to resign in 1967 because of United's no-marriage rule. In 1971, more than four years after her resignation, she filed a charge with EEOC, contending like Evans, that she had been terminated improperly under Title VII. Collins argued that her complaint was timely filed because the alleged violation was a continuing one, since United had steadfastly denied to her all employment privileges, including her prior seniority. The district court dismissed on the basis of untimeliness. In affirming the district court, the Court of Appeals for the Ninth Circuit stated:

> We cannot accept Collins' argument that her continuing non-employment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, it is the alleged unlawful act or practice—not merely its effects—which must have occurred within 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period.

The major difference between the *Collins* case and the case at hand is that Evans was re-employed as a stewardess several years after her original employment and her original cause of action had ended, whereas Collins was not re-employed. Evans argues that the violation here is a continuing one because United's current practice is to deny her seniority credit for the period prior to 1972.

Evans would have this Court find a present discrimination when the adverse effect of a past discrimination is still felt because of a current policy of the employer, even though such current policy is not discriminatory with respect to sex.[5] This is congruent with the thesis that the Ninth Circuit specifically

5. Such a holding, however, might well discourage an employer from re-hiring a worker against whom it had discriminated previously. This reluctance would stem from both the direct burden of additional costs associated with such an employee and the fear of disruption of the employer's relations with other employees who might consider themselves to be unfairly disadvantaged, in terms of the regular and neutral seniority program, relative to the rehired employee.

declined to accept in *Collins* when it stated that "the alleged unlawful act or practice—not merely its effects— . . . must have occurred within [the statutory period] preceding the filing of charges before the EEOC."[6]

In Waters v. Wisconsin Steel Works, 502 F. 2d 1309 (7th Cir. 1974), *petition for cert. filed*, 44 LW 3037 (U. S. Feb. 24, 1975 (No. 74-1064), this Court adopted essentially the same rationale that the Ninth Circuit employed in *Collins*. Wisconsin Steel had engaged in racially discriminatory hiring practices, but in 1964 it began to hire black bricklayers, including Waters, who was hired in July. When business slackened in September, 1964, Waters was among those laid off, pursuant to a "last hired, first fired" seniority system. Waters contended that this seemingly neutral policy of last hired, first fired served to perpetuate past discrimination because recently hired blacks were disadvantaged relative to whites who might not have had greater seniority but for the prior discriminatory hiring practices. Waters' argument was rejected by this Court, which stated:

> Wisconsin Steel's employment seniority system embodying the "last hired, first fired" principle of seniority is not

6. *Accord*, Buckingham v. United Air Lines, 11 FEP Cases 344 (C. D. Cal. 1975) (dictum), decided independently of *Collins*. In *Buckingham* eight stewardesses alleged discriminatory terminations or transfers to ground positions by United pursuant to its no-marriage policy. The stewardesses filed charges within 90 days of the agreement between their union and United rescinding the "no-marriage" policy, see note 2 supra, but more than 90 days after the allegedly discriminatory transfers and terminations. The stewardesses contended that the agreement, which restored no rights to them, perpetuated the effects of the prior discrimination and was, therefore, discriminatory in itself. The district court decided that the transfers and terminations in question were not discriminatory in fact, and also concluded that:

> [e]mployer action . . . such as the termination or transfer of an employee . . . constitutes a 'completed act' at the time it occurs, and unless a charge of discrimination is filed with the Equal Employment Opportunity Commission within the completed time period following the completed act, an action under Title VII is barred.

11 FEP Cases at 349.

> of itself racially discriminatory [n]or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII.[7]

The *Waters* decision adjudicated more issues than this one. But the seniority issue was not insignificant in *Waters* and this Court appears to have concluded that detriments that stem from the interaction of a prior discrimination and a seniority policy that is not discriminatory in itself cannot be deemed to be proximately caused by the prior discrimination.

The holding in *Waters* must inform our decision here.[8] United's seniority policy in itself is not discriminatory with respect to sex.[9] A policy which is neutral cannot be said to perpetuate past discriminations in the sense required to constitute a current violation of Title VII. If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termina-

7. 502 F. 2d at 1318. This holding is distinct from another portion of Waters in which a "present perpetuation of the racial discrimination of the past" was found. There an amendment to the regular seniority policy, which favored only eight specific whites who had previously worked for the company but who had cut all ties with the firm by accepting severance pay, was determined to be an expression of a discriminatory policy in the circumstances of the case. 502 F. 2d at 1320-21, *petition for cert. filed sub nom.* Bricklayers and Stone Masons, Local 21 v. Waters, 44 LW 3038 (U. S. Apr. 25, 1975) (No. 74-1350). Unlike the Wisconsin Steel Works, however, United does not appear to have deviated from its regular, and neutral, seniority policy in its dealings with Evans.

8. But see Tippett v. Liggett & Meyers Tobacco Co., 316 F. Supp. 292 (N. D. N. C. 1970); EEOC Dec. No. 71-413, 3 FEP Cases 233 (1970). Two of the cases emphasized by Evans—Burwell v. Eastern Airlines, 394 F. Supp. 1361, 10 FEP Cases 882 (E. D. Va. 1975), and Marquez v. Omaha District Sales Office, 440 F. 2d 1157, 3 FEP Cases 275 (8th Cir. 1971)—involved continuing employer policies discriminatory in themselves, whereas in the present case the current seniority policy of United is neutral on its face with regard to sex.

9. See note 4 *supra* and accompanying text.

tion alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period.

Accordingly, the judgment of the district court is affirmed.

CUMMINGS, *Circuit Judge* (dissenting):—With due respect, I dissent. The gravamen of the complaint is that United has continued to fail to credit plaintiff with prior seniority. This is a current practice of defendant and results in plaintiff's receiving less seniority than male stewards hired between her February 1968 illegally forced resignation and her February 1972 reemployment. The majority, incorrectly I believe, holds that this suit, filed in 1973, is barred by the pertinent statute of limitations, 42 U. S. C. § 2000e-5(e).[1] However, as we held in *Cox* v. *United States Gypsum Company*, 409 F. 2d 289, (7th Cir. 1969), and again in *Bartmess* v. *Drewrys U. S. A., Inc.*, 444 F. 2d 1186, 1188 (7th Cir. 1971), certiorari denied, 404 U. S. 939, the limitation contained in what is now Section 2000e-5(e) is no bar when a continuing practice of discrimination is being challenged.

The issue then is whether defendant's policy is an act of continuing discrimination. In analyzing this issue the threshold question the court should ask is: does Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e et seq.) impose an obligation upon the employer which was allegedly violated by the challenged policy at the time plaintiff instituted this action? To determine whether there was a violation, it should next consider whether the challenged facially neutral policy gives collateral effect to a past act of discrimination, and, if so, whether the past act of discrimination is the proximate cause of the disparity complained of by plaintiff. If these conditions have been met, the plaintiff has proven discrimination in violation of Title VII. See *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d

1. The predecessor Section 2000e-5(d) required that a charge be filed with the EEOC within 90 days after the occurrence of the unlawful practice. In 1972, the period was extended to 180 days.

211, 236 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354 (8th Cir. 1973).

Applied to the facts of this case, this analysis inexorably results in the conclusion that United's failure to credit plaintiff with back seniority is a current act of discrimination. Clearly, Title VII requires employers to determine an employee's seniority on a non-discriminatory basis. See 42 U. S. C. § 2000e2(h); *United States* v. *N. L. Industries, supra.* Because plaintiff's seniority is being measured from the date of her re-employment, defendant's policy gives collateral effect to its past act of discrimination, *viz.*, plaintiff's illegal termination. That 1968 wrongful act is the proximate cause of the existing disparity between plaintiff's wages and working conditions and those of male stewards hired between February 1968 and February 1972. Defendant is thus presently perpetuating the effects of its past discrimination. Plaintiff's charge was therefore timely filed and the district court had jurisdiction of her action. *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359 (7th Cir. 1968).

The Equal Employment Opportunity Commission considered plaintiff's charge to be timely, and its interpretation of the time limitation contained in 42 U. S. C. § 2000e-5(e) deserves deference. *Cox* v. *United States Gypsum Company*, 409 F. 2d 289, 291 (7th Cir. 1969). This view of timeliness has judicial and administrative support.

In *Burwell* v. *Eastern Air Lines, Inc.*, 394 F. Supp. 1361, 1367, (E. D. Va. 1975) stewardess Burwell was terminated for pregnancy. Seven months later she was reinstated with loss of seniority. Although Eastern had changed its maternity policy prior to suit, Judge Merhige held that her EEOC charge almost three years after her return to Eastern was a timely filing with the EEOC because of her continuing loss of seniority. His reasoning is similar to that adopted earlier by the Commission in a case on all fours with the one at bar. EEOC Doc No. 71-413, 3 FEP Cases 233 (1970). We should pay heed to its construction of Title VII (*Griggs* v. *Duke Power Co.*, 401 U. S.

424, 434, *Choate* v. *Caterpillar Tractor Co.*, *supra* 402 F. 2d at 360) and therefore require United to bridge plaintiff's seniority. See *Marquez* v. *Omaha District Sales Office*, 440 F. 2d 1157, 1159-1160 (8th Cir. 1971); *Tippett* v. *Liggett & Myers Tobacco Co.*, 316 F. Supp. 292, 295-296, (M. D. N. C. 1970); *Healen* v. *Eastern Air Lines*, 8 FEP Cases 917 (N. D. Ga. 1973).

Defendant maintains a present bias by enabling its past bias to reach into the present through its seniority practice. United should not be able now to penalize the victim of its prior discrimination.[2]

The cases relied on by the majority are readily distinguishable. In *Collins* v. *United Airlines*, 514 F. 2d 594 (9th Cir. 1975), plaintiff sought reinstatement several years after she had been terminated pursuant to United's "no marriage" rule. The alleged continuing discrimination in *Collins* was the failure to rehire plaintiff. Title VII, however, imposes no obligation on the employer to hire anyone unless the refusal is motivated by discrimination. There was no evidence in *Collins* that the decision not to rehire the plaintiff was based at all upon the past act of discrimination. In *Buckingham* v. *United Airlines*, 11 FEP Cases 344, 345 (C. D. Cal. 1975), the court specifically found that plaintiffs' terminations or transfers were not caused by the no marriage rule or any other act of discrimination. Finally, *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (7th Cir. 1974), is inapposite. In that case, the plaintiffs failed to show that the prior discrimination was the proximate cause of their layoffs.

I would reverse.

2. The majority's fear that a finding of continuing discrimination in this case would discourage the re-employment of wronged employees is not warranted. After her termination, the plaintiff here filed a grievance with the Union. United's decision to rehire her resulted from Union pressure, which would have been applied without regard to our holding in this case.

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1481

CAROLYN J. EVANS,

Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division 74-C-2530

BERNARD M. DECKER,

Judge.

On Petition for Rehearing

ARGUED NOVEMBER 6, 1975—DECIDED APRIL 26, 1976

Before CUMMINGS, ADAMS* and SPRECHER, *Circuit Judges.*

ADAMS, *Circuit Judge.* This suit was brought by Carolyn J. Evans, under Title VII of the Civil Rights Act of 1964,[1] to recover seniority and back pay that she allegedly lost because of her separation from employment with United Air Lines. The complaint claims that United discriminated against Evans in

* The Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

1. 42 U. S. C. § 2000e *et seq.* (Supp. III 1973).

February, 1968, when United, by reason of Evans' marriage, forced her to resign her employment as a stewardess. She also asserts, however, a continuing discrimination against her as a result of the current application of United's seniority policies, which consider only continuous time-in-service and thereby perpetuate the adverse effects of the original discriminatory discharge.

Evans was employed by United as a stewardess from November, 1966 until February, 1968, when she involuntarily resigned. During that period it was the policy of United that marriage disqualified a woman from continuing her employment as a stewardess. On November 7, 1968, United discontinued its policy of requiring stewardesses to remain unmarried,[2] and on February 16, 1972, Evans was again hired as a new employee of United. She was provided stewardess training for newly hired employees, which she completed on March 16, 1972.

Evans filed a charge of discrimination with the EEOC on February 21, 1973—five years after her termination from employment, and more than four years after United eliminated its no-marriage rule. She had not filed any prior charge of discrimination with the EEOC, or with any other governmental agency, or in any way challenged United's no-marriage rule.

2. United, by letter agreement of November 7, 1968 with a collective bargaining agent, agreed to reinstate those stewardesses who had been terminated under the no-marriage rule and who had filed charges or grievances. Every stewardess desirous of reinstatement was required to make application within thirty days of notification of this agreement. Evans did not qualify for reinstatement under this agreement because she had not filed a prior charge of discrimination against United with the EEOC or any state agency, nor had she filed a grievance under the applicable collective bargaining agreement.

By an October 16, 1969 letter agreement, United undertook to reinstate those stewardesses who had transferred to ground positions because of the no-marriage rule and who were employed by United on that date. Evans acquired no right under the letter agreement of October 16, 1969 inasmuch as she had not transferred to a ground position and was not an employee with United as of October 16, 1969.

United's no-marriage policy for stewardesses was held unlawfully discriminatory in *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir.), *cert. denied*, 404 U. S. 991 (1971).

United took the position that a timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to filing a civil action under Title VII. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357, 359 (7th Cir. 1968). Therefore it moved to dismiss the complaint on the ground that Evans had failed to file a charge with the EEOC within ninety days of the alleged unlawful practice[3] which occurred in February, 1968, United claimed, when Evans was forced to resign as a stewardess and her employment and seniority were terminated.

The district court granted United's motion to dismiss the complaint on the ground that plaintiff "has not been suffering from any 'continuing' violation" and is "seeking to have the court merely reinstate the November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation."

Evans brought this appeal. After argument, the Court affirmed the dismissal by the trial court, relying upon an interpretation of *Waters* v. *Wisconsin Steel Works*.[4] Petitions for rehearing by the panel and *en banc* were filed. Pending the consideration of those petitions, the Supreme Court decided *Franks* v. *Bowman Transportation Co.*[5] In view of the Supreme Court's decision, rehearing was granted by the panel on April 6, 1976. We now reverse and remand.

I.

Evans claims that a current employment practice or policy, though facially neutral, is unlawful if by its operation it enables prior discrimination to reach into the present, and thus prolongs

3. Prior to the 1972 Amendments of the Civil Rights Act, 42 U. S. C. § 2000e-5(e) provided that in order to bring an action under this section, a person must file a charge with the EEOC within ninety days after the occurrence of the alleged unlawful employment practice.

4. 502 F. 2d 1309 (7th Cir. 1974), *pet. for cert. filed*, 44 U. S. L. W. 3037 (U. S., Feb. 24, 1975) (No. 74-1064).

5. 44 U. S. L. W. 4356 (U. S. Mar. 24, 1976)

the effect of such discrimination. She also contends that where the challenged employment practice is current and continuing, the usual procedural requirement of Title VII, that an EEOC charge "be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," is inapplicable. Evans appears to argue that where the practice is a persistent one, a charge filed at any time during the continuance of the practice is *ipso facto* timely.

Her charge would not be timely and the jurisdictional prerequisites to a civil action would not be fulfilled under the Civil Rights Act, Evans concedes, unless her theory of a continuing violation is valid. Evans also concedes that United's current seniority policy is facially neutral with respect to sex,[6] and she does not contend that United still discriminates against females by reason of any current no-marriage policy. She does maintain however, that United's discriminatory termination in February, 1968 caused her to lose her seniority and, as a result of that termination in combination with United's on-going seniority policy, she suffers a discriminatory loss of seniority and related benefits, including pay, to the present date.

On the other hand, United asserts that the only legally cognizable injury to Evans was her termination of employment and seniority in 1968. In this respect, United's argument would appear to rest, *sub silentio,* on the protection afforded bona fide seniority systems by section 2000e-2(h). That section provides:

> Notwithstanding any other provision of this sub-chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system. . . .

6. United's policy of crediting toward seniority only *continuous* time-in-service works to the disadvantage of rehired employees. A new employee who was hired in the interim between the former employee's termination and rehiring will have greater seniority than the rehired employee, although the new employee may have less total time-in-service. This policy would seem to be neutral, however, as between male and female employees.

Since it is agreed that United's continuous-time-in-service seniority system is facially neutral with regard to sex, the present application of the seniority policy to Evans is not a violation of Title VII, according to United. Rather, in their view of the case, any actionable injury to Evans stems from her termination in February, 1968, whereby she lost her initial seniority. And it was from such date that the time limit began to run, and has long-since expired, with respect to any disadvantages in employment-related benefits.

United argues that if a discriminatory act is considered to continue for so long as there is some lingering effect, every alleged discriminatory act could be litigated at any time. A discrimination, United reasons, would never be final, despite the limitation period under section 2000e-5(e), since there might always be some lingering effects—monetary or otherwise.

II.

The Supreme Court addressed the scope of the neutral-seniority-policy defense set forth in section 2000e-2(h) in *Franks* v. *Bowman Transportation Co.*[7] The Court in *Franks* was asked to determine whether Section 2000e-2(h) (section 703(h) of the Civil Rights Act of 1964) precluded the grant of retroactive seniority as a form of relief to job applicants who had not been hired because of racial discrimination. It held that such relief was appropriate, despite a facially neutral seniority policy, where the individual complainants could prove that they had been the actual victims of discriminatory hiring practices.[8] The decision was predicated upon the Supreme Court's conclusion

7. 44 U. S. L. W. 4356 (U. S., Mar. 24, 1976.)

8. *Id.* at 4359, 4361, 4363. This Court's decision in *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309 (7th Cir. 1974), *pet. for cert. filed.* 44 U. S. L. W. 3037 (U. S., Feb. 24, 1975) (No. 74-1064), would not appear to be to the contrary. In *Waters,* the employees do not seem to have established a causal linkage between their seniority status, which resulted in their lay-offs, and specific acts of discrimination directed at them personally.

that section 2000e-2(h) was intended to protect only those seniority rights that were established prior to the effective date of Title VII in 1965:[9]

> [W]hatever the exact meaning and scope of § 703(h) in light of its unusual legislative history and the absence of the usual legislative materials, . . . it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.

As the Supreme Court observed, Congress is well aware that employment discrimination is a "complex and pervasive phenomenon."[10] The House report on the Equal Employment Opportunity Act Amendments of 1972 notes that

> Experts familiar with the subject generally describe the problem in terms of "systems" and "effect" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority in lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. . . . Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance.[11]

The Supreme Court reiterated in *Franks* that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity. . . ."[12]

"[O]ne of the central purposes of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination," the Court said.[13] Therefore, it concluded that

9. *Id.* at 4360.

10. *Id.* at 4361 n. 21.

11. H. Rep. No. 92-238, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U. S. Code, Cong. & Admin. News 2137, 2144.

12. 44 U. S. L. W. at 4360.

13. *Id.*

"[a]dequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position of the seniority system that would have been his had he been hired at the time of his application."[14]

III.

It is in the context of the *Franks* decision that we must consider whether Evans' complaint was filed within 90 days of a violation of Title VII, thus affording jurisdiction to the district court. More specifically, the issue is whether section 2000e-2(h) may be used to interpose a legal bar to Evans' theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuing violation of her Title VII rights.

A seniority policy that credits only continuous time-in-service necessarily has an adverse impact on rehired employees who have more total time-in-service, but less continuous time-in-service, than newly hired employees. This disadvantaged class of rehired employees may include employees who were rehired subsequent to terminations that resulted from prior discriminatory practices. Evans claims to be an employee of the latter type.

It is apparent that United's continuous-time-in-service seniority program may put an employee who has been discharged and later rehired into an inferior seniority position than would have been the case if the employee had not been discharged and, thereby, perpetuates some of the disadvantages resulting from the prior discharge. If the prior discharge was itself a discriminatory one, then United's seniority policy is an instrument that extends the impact of past discrimination, albeit unintentionally. Consequently, the present application of United's seniority policy is deemed to be discriminatory. It has been held in a number of instances that a facially neutral seniority policy may

14. *Id.* at 4361.

be in violation of Title VII if its effect is to perpetuate the disadvantages accruing from prior discrimination.[15]

The teaching of *Franks* confirms these holdings. Section 2000e-2(h) must be understood as relatively narrow, although necessary, exception to the Congressional intent to prohibit all practices of whatever form that create inequalities. It applies only to seniority rights vesting before the 1965 effective date of Title VII. United's seniority program, however, transmits into the present the disadvantages allegedly resulting from a 1968 discrimination. In these circumstances, section 2000e-2(h) cannot be used to erect a legal bar to Evans' claim that she is the victim of a current discrimination as a result of a present seniority practice that imposes upon her the effects of a past employment discrimination by United.

For the above reasons, we conclude that Evans' complaint, having been filed during the pendency of the alleged discrimination, was not time-barred. Accordingly, we reverse and remand the cause to the district court for action consistent with this opinion.

15. *Acha* v. *Beame*, ... F. 2d ..... (2d Cir. 1976); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 236 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354 (8th Cir. 1973); *Tippett* v. *Liggett & Meyers Tobacco Co.*, 316 F. Supp. 292 (M. D. N. C. 1970); *Healen* v. *Eastern Air Lines*, 8 FEP Cases 917 (N. D. Ga. 1973); EEOC Dec. No. 71-413, 3 FEP Cases 233 (1970). *See Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971), where the Supreme Court declared:

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit
Chicago, Illinois 60604.

—June 7, 1976

Before:

Hon. WALTER J. CUMMINGS, *Circuit Judge*,
Hon. ARLIN M. ADAMS,* *Circuit Judge*,
Hon. ROBERT A. SPRECHER, *Circuit Judge*.

No. 75-1481.

CAROLYN J. EVANS,
Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition of the appellee, United Air Lines, Inc., for a hearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellee for a rehearing in the above-entitled appeal be, and the same is hereby denied.

* The Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

SECTION 706(d) OF THE CIVIL RIGHTS ACT OF 1964.*
[42 U. S. C. § 2000e-5(d)]

Sec. 706(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

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* Prior to 1972 amendments.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,
Petitioner,

vs.

CAROLYN J. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1976
CERTIORARI GRANTED NOVEMBER 1, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333.

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CONTENTS OF APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS,
Seventh Circuit—Docket.

No. 75-1481

CAROLYN J. EVANS
Plaintiff-Appellant,

vs.

UNITED AIRLINES INC.
Defendant-Appellee.

DOCKET ENTRIES

Date	Proceedings
5/30/75	Entered order stating the following: (1) appellant's docketing fee due immediately; (2) record will be filed with the Clerk by 6/16/75; (3) appellant's brief due 7/28/75; (4) appellee's brief due 8/29/75; (5) appellant's reply brief due 9/15/75. Clerk of D. C. ordered to prepare entire record.
5/30/75	Issued cert. cy. order 5/30/75 to Clerk, Ct. Reporter & J. Decker.
7/28/75	Filed 15c of Appellant's Brief—svc.
9/ 2/75	Filed 25c of Appellee's Brief—svc.
9/12/75	Filed 15c of Appellant's Reply Brief—svc.
9/29/75	Entered order setting appeal for oral argument on 11/6/75. Oral argument limited to 20 mins.

11/ 6/75	Heard and taken under advisement.
1/29/76	Filed Per Curiam Opinion.
1/29/76	Entered final judgment order Affirming, with costs.
2/12/76	Filed 25c of Appellant's Petition for Rehearing en banc—dist. en banc—svc.
2/20/76	Letter sent by Clerk requesting appellee file answer to appellant's petition for rehearing en banc by 3/1/76.
2/23/76	Filed O&3c of Motion of the Equal Employment Opportunity Commission to File Brief Amicus Curiae in Support of Petition for Rehearing and Suggestion for Rehearing En Banc tendered 25c of Brief—svc.
2/24/76	Filed 25c of EEOC's Brief as Amicus in support of Petition for Rehearing en banc—filed per order—svc., dist. en banc.
2/24/76	Entered Order Granting Motion to file Amicus Brief Instanter.
2/27/76	Filed O&3c of Appellant's Motion for leave to file supplemental brief—svc.
2/27/76	Filed O&3c of Appellee's Motion for Extension of time to answer appellant's petition for rehearing.
3/ 1/76	Filed 25c of Appellant's Supplemental Brief, per order—svc., dist.
3/ 1/76	Entered Order Granting Extension of time 3/5/76 to file answer to Petn. for rehearing.
2/26/76	Filed 25c of Appellant's Additional Authority—svc., dist. en banc.
3/ 5/76	Filed 25c of Appellee's Response to Petition for Rehearing en banc. svc., dist. en banc.
3/31/76	Filed 25c of Appellant's Supplemental Brief, per order—svc., dist. en banc.

3/31/76	Entered Order Granting Motion for leave to file supplemental brief instanter. Further ordered that appellee file response to such supplemental brief of the appellant within 7 days.
4/ 7/76	Filed 25c of Appellee's Response to Appellant's Supplemental Brief in Support of Petition for Rehearing—svc., dist. en banc.
4/ 6/76	Entered Order Granting Appellant's Petition for Rehearing.
4/26/76	Entered final judgment Order on Petition for Rehearing Reversing and Remanding, with costs.
4/26/76	Filed Opinion by J. Adams.
5/10/76	Filed 25c of Petition for Rehearing en banc of Appellee—svc, dist. en banc.
4/29/76	Filed O&lc of Appellant's Bill of Costs in the amount of $303.88—svc.
6/ 7/76	Entered order denying petition for rehearing.
6/ 9/76	Mandate Issued.
6/16/76	Filed receipt of D.C. formandate and record.
9/13/76	Filed receipt for petition for cert., from S.C. #76-333.
11/ 8/76	Filed order from Supreme Court dated 11/1/76 No. 76-333 granting petition.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLYN J. EVANS,
Plaintiff,
vs.
UNITED AIR LINES, INC.,
Defendant.
No. 74 C 2530

COMPLAINT

Plaintiff complains of defendant as follows:

I. This is a suit for injunctive and other relief authorized by and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq*. The jurisdiction of the Court is invoked to secure protection of and to redress deprivation of rights secured by 42 U. S. C. § 2000e-2, making it illegal to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex.

II. Defendant United Air Lines, Inc. (hereinafter referred to as United) is a corporation doing business throughout the United States, with a major place of business in the Northern District of Illinois. Plaintiff Carolyn J. Evans is a stewardess employed by United, and is a resident within the Northern District of Illinois. The unlawful employment practices alleged herein were committed within the territorial jurisdiction of this Court as provided in 42 U. S. C. § 2000e-5(f). Defendant employs more than twenty-five (25) persons and is engaged in an enterprise affecting commerce within the meaning of 42 U. S. C. § 2000e.

III. Plaintiff filed charges with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) on

February 21, 1973, charging that defendant United discriminated and continues to discriminate against plaintiff on the basis of sex (female). Plaintiff complained of and does complain of the fact that United maintained a policy and practice of terminating females, but not males, from their flight personnel (stewardess) positions upon marriage or contemplation of marriage; that plaintiff was forced to resign her position as a stewardess pursuant to this policy; that United refused to reinstate plaintiff; and that, when United did later rehire plaintiff, it refused and continues to refuse to credit plaintiff with all her former seniority. On August 29, 1974, plaintiff was granted the right to sue in United States District Court by the EEOC pursuant to 42 U. S. C. § 2000e-5(f). A copy of the letter granting plaintiff the right to sue is attached hereto as Exhibit A. This suit has been filed within the required 90-day period prescribed in 42 U. S. C. § 2000e-5(f).

IV. Plaintiff Evans began employment as a stewardess for defendant United in November, 1966, and completed stewardess training on December 28, 1966. Plaintiff was subsequently forced by defendant United to submit her resignation from her position as stewardess pursuant to United's policy and practice of terminating females, but not males, from their flight personnel positions upon marriage or contemplation of marriage. Plaintiff's employment by United was effectively terminated in February, 1968, pursuant to aforesaid forced resignation in accordance with said policy and practice.

V. On numerous subsequent occasions, plaintiff sought reinstatement as a stewardess with defendant United and was refused such reinstatement by defendant. In November, 1971, plaintiff again sought such reinstatement, and was effectively re-employed as a stewardess by United on February 16, 1972. Following one month of training completed on March 16, 1972, plaintiff has continued as a stewardess in the employ of United to this date.

VI. Plaintiff has been credited by defendant with "Company" (or "pay") seniority as of February 16, 1972, and with "stew-

ardess" (or "system") seniority as of March 16, 1972. Among other effects, either or both types of seniority directly or indirectly determine a stewardess' wages, amount of minimum monthly compensation, amount of entitlement to furlough pay, amount of compensation for and duration and timing of vacation periods, rights to retention in case of furlough due to reduction in force, rights to re-employment after furlough, and rights to preference in assignment as to geographical location and type of aircraft.

VII. On November 7, 1968, defendant United and the Air Line Pilots Association, International (hereinafter referred to as Association), which was and is at all times relevant herein the exclusive collective bargaining agent of all stewardesses employed by United, concluded a "letter of agreement" whereby marriage would no longer disqualify a stewardess from continuing in the employ of United as a stewardess, and whereby stewardesses who had been terminated by reason of United's no-marriage policy would be offered reinstatement with no loss of seniority if they qualified under certain express conditions. A copy of this "letter of agreement" is attached hereto as Exhibit B, and is incorporated by reference as if set forth at length herein. As therein provided, plaintiff was excluded from the class of those eligible for reinstatement as active stewardesses with United.

VIII. On October 16, 1969, defendant United and said Association concluded a second "letter of agreement", a copy of which is attached hereto as Exhibit C, and is incorporated by reference as if set forth at length herein. As therein provided, plaintiff was excluded from the class of those eligible for reinstatement as active stewardesses with United.

IX. On October 16, 1972, plaintiff filed a grievance against defendant United protesting United's continuing failure to credit her with all former seniority. This grievance has been denied by United.

X. Defendant United has failed and refused and continues to refuse to credit plaintiff Evans with all former seniority

earned by plaintiff from the date of her initial employment in November, 1966, and the date of her initial graduation from stewardess training on December 28, 1966, as well as continuous seniority from those dates, and has thereby caused plaintiff to suffer loss of wages and other benefits. This is a continuing violation of 42 U. S. C. § 2000e-2, resulting from: (1) defendant United's wrongful conduct in implementation of its no-marriage rule, thereby forcing plaintiff Evans to be terminated as a stewardess in February, 1968, which conduct constituted discrimination on the basis of sex in violation of 42 U. S. C. § 2000e-2; (2) defendant United's wrongful exclusion of plaintiff from the reinstatement opportunity provided to others in the two letters of agreement (referred to in paragraphs VII and VIII herein) executed with Association, which served to perpetuate and continue United's discriminatory policy as applied to plaintiff in violation of 42 U. S. C. § 2000e-2; (3) defendant United's continued failure to provide for and offer plaintiff reinstatement as a stewardess until November, 1971, which failure constituted discrimination based upon sex in perpetuation of the effects of prior discrimination in violation of 42 U. S. C. § 2000e-2; and (4) defendant United's continuing implementation of and failure to remove from plaintiff the continuing and presently operative effects of its discriminatory practices and policies, which failure constitutes continuing discrimination based upon sex in violation of 42 U. S. C. § 2000e-2. As a result of defendant United's continuing discrimination against plaintiff because of her sex, plaintiff has been and continues to be deprived of her rightful seniority, wages, and other benefits of employment, in violation of 42 U. S. C. § 2000e-2.

Wherefore, plaintiff demands judgment against defendant United Air Lines, and prays for the following relief:

1. An order permanently enjoining defendant United from engaging in any discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.;*

2. An order requiring defendant United to restore to plaintiff and credit plaintiff with all seniority back to the starting date of her initial employment with United, including credit for any period of time, since such date, during which plaintiff was separated from United by reason of the discriminatory conduct of United, as well as credit for all such seniority actually earned;

3. An order requiring defendant United to compensate plaintiff for all amounts of back pay and other benefits of employment lost as a result of the discriminatory employment practices of said defendant;

4. An order requiring defendant United to pay to plaintiff exemplary damages in the amount of One Hundred Thousand ($100,000) Dollars;

5. An order requiring defendant to pay the cost of this suit;

6. An order requiring defendant to pay reasonable attorney's fees;

7. Any and all other relief as the Court deems proper, equitable and just.

Dated: September 4, 1974

DORFMAN, DE KOVEN, COHEN & LANER
Suite 3301
One IBM Plaza
Chicago, Illinois 60611
467-9800
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLYN J. EVANS,
Plaintiff,
vs.
UNITED AIR LINES, INC.,
Defendant.
} Civil No. 74 C 2530

ANSWER

Now comes the Defendant and answers the Complaint as follows:

1. Defendant admits that Plaintiff purports to bring this action under Title VII of the Civil Rights Act of 1964 but denies that the jurisdictional prerequisites under the Act have been met.

2. Defendant admits the allegations of paragraph 2 but denies that Defendant has committed an unlawful practice.

3. Defendant admits that a letter from the Equal Employment Opportunity Commission dated August 29, 1974 was attached to the Complaint as Exhibit A but is without information or knowledge sufficient to form a belief as to the remaining allegations of paragraph 3.

4. Defendant admits that Plaintiff began employment as a stewardess for Defendant in November, 1966 and completed stewardess training on December 28, 1966. Defendant further admits that Plaintiff's employment was terminated by her resignation in February, 1968. Defendant denies the remaining allegations of paragraph IV of the Complaint.

5. Defendant admits that in November, 1971, Plaintiff sought employment as a stewardess and was employed as a

stewardess on February 16, 1972 and further admits that following one month of training completed on March 16, 1972, Plaintiff has continued employment as a stewardess. Defendant is without information or knowledge sufficient to form a belief as to the remaining allegations of paragraph V.

6. Defendant admits the allegations of paragraph VI, except denies that Company seniority is "pay" seniority or that stewardess seniority is "system" seniority, the opposite being true.

7. Defendant admits the allegations of paragraph 7 of the Complaint.

8. Defendant admits the allegations of paragraph 8 of the Complaint.

9. Defendant admits the allegations of paragraph 9 of the Complaint.

10. Defendant admits it has refused to credit Plaintiff with seniority from the date of her first employment in November, 1966 and the date of her graduation from stewardess training on December 28, 1966, but Defendant denies the remaining allegations of paragraph X.

First Affirmative Defense

The Complaint fails to state a cause of action upon which relief can be granted.

Second Affirmative Defense

The Complaint fails to allege exhaustion of administrative remedies which is a jurisdictional prerequisite to suit under 42 U. S. C. 2000e, *et seq; i.e.,* failure to first file her charge with the Illinois Fair Employment Practice Commission.

Third Affirmative Defense

Plaintiff failed to file a charge with the Equal Employment Opportunity Commission within the time limits set forth in 42

U. S. C. 2000e, *et seq;* which timely filing is a jurisdictional prerequisite for a civil action under the Act.

Fourth Affirmative Defense

The Act, 42 U. S. C. 2000e, *et seq;* does not provide for exemplary damages.

WHEREFORE, Defendant requests the Court to dismiss and take nothing from her Complaint.

Respectfully submitted,

EARL G. DOLAN
KENNETH A. KNUTSON
P. O. Box 66100
Chicago, Illinois 60666
952-6059
Attorneys for Defendant United Air Lines, Inc.

Dated: September 26, 1974.

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLYN J. EVANS,
Plaintiff,
vs.
UNITED AIR LINES, INC.,
Defendant.
} Civil No. 74 C 2530

PLAINTIFF'S REPLY TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE

In accordance with Rule 7(a), Federal Rules of Civil Procedure, and pursuant to Order entered upon direction of the Presiding Magistrate in this cause on October 7, 1974, now comes plaintiff Evans, by and through her attorneys, Dorfman, De Koven, Cohen & Laner, in Reply to defendant United's Second Affirmative Defense, and states that she has exhausted her state administrative remedies in this cause, within the meaning of 42 U. S. C. § 2000e-5(c). In support thereof, plaintiff further states the following:

1. Plaintiff filed her charge against defendant United with the Equal Employment Opportunity Commission (herein called "EEOC") on February 21, 1973. Said EEOC charge is the same EEOC charge referred to in plaintiff's Complaint in this cause.

2. On February 23, 1973, EEOC transmitted said charge by letter to the Illinois Fair Employment Practices Commission (herein called "FEPC") and thereby deferred said charge to said FEPC. Copies of said EEOC deferral letter, and the FEPC certificate acknowledging receipt of same, are attached hereto as Exhibits B (consisting of two pages) and C, respectively,

and are hereby incorporated by reference as if set forth at length herein. A copy of a letter from EEOC District Counsel Dolores Knapp to plaintiff's attorneys, dated October 2, 1974, explaining certain deletions made by EEOC from the aforementioned EEOC deferral letter, is attached hereto as Exhibit A, and is hereby incorporated by reference as if set forth at length herein.

3. During the FEPC meeting of April 11-12, 1973, the Commissioners of the FEPC unanimously voted to issue an order dismissing plaintiff's charge (as specified above) for "incomplete investigation" and returning said charge to the EEOC without prejudice to the rights of the parties concerned. Copies of the relevant portions of the minutes of said FEPC meeting (to wit, pages 1 and 7-11 thereof) are attached hereto as Exhibit F, and are hereby incorporated by reference as if set forth at length herein. A copy of a memorandum dated April 6, 1973, including a four-page list appended thereto, from Leo Franklin of the FEPC to the FEPC Commissioners, and recommending dismissal of plaintiff's aforementioned charge, without prejudice, because of 'the present FEPC backlog", is attached hereto as Exhibit E, and is hereby incorporated by reference as if set forth at length herein. A copy of a letter from Irene Repa, FEPC Assistant Director, Investigation Division, to plaintiff's attorneys, dated October 4, 1974, authenticating Exhibits E and F, is attached hereto as Exhibit D, and is hereby incorporated by reference as if set forth at length herein. (Item 1 referred to in said Repa letter [to wit, the aforementioned EEOC transmittal letter of February 23, 1973 to FEPC] is not attached hereto, in order to avoid duplication of Exhibit B.)

4. On April 23, 1973, following deferral to, and the termination of, state FEPC administrative proceedings concerning

plaintiff's charge, as detailed above, EEOC assumed jurisdiction of said charge, as stated in the Knapp letter (Exhibit A).

WHEREFORE, plaintiff requests the Court to order that defendant's Second Affirmative Defense be stricken from defendant's Answer filed in this cause.

Dated: October 16, 1974.

Respectfully submitted,

DORFMAN, DE KOVEN, COHEN & LANER,
Attorneys for Plaintiff
One IBM Plaza
Suite 3301
Chicago, Illinois 60611
312-467-9800

(Certificate of Service and Exhibits Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLYN J. EVANS,
Plaintiff,
vs.
UNITED AIR LINES, INC.,
Defendant.

Civil No.
74 C 2530

DEFENDANT'S MOTION TO DISMISS

Defendant, United Air Lines, Inc., moves to dismiss Plaintiff's Complaint filed herein on the ground that this Court is without jurisdiction under Title VII of the Civil Rights Act of 1964 because of the Plaintiff's failure to file charges with the Equal Employment Opportunity Commission within the time provided of the alleged unlawful violation as required as a jurisdictional prerequisite to a civil action under the Act. 42 U. S. C. § 2000e-5(d).

In support of this Motion, Defendant attaches a Memorandum of Authorities which is filed herewith.

Respectfully submitted,

EARL G. DOLAN
KENNETH A. KNUTSON
Attorneys for Defendant,
United Air Lines, Inc.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable Bernard M. Decker

Cause No. 74 C 2530 Date April 9, 1975

Title of Cause—Evans v. United Air Lines, Inc.

Memorandum opinion filed.

Accordingly, Deft.'s Motion to dismiss is granted and complaint briefly dismissed.

Decker, *J.*

April 10, 1975

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CAROLYN J. EVANS, *Plaintiff,*

vs.

UNITED AIR LINES, INC., *Defendant.*

No. 74 C 2530

MEMORANDUM OPINION

Plaintiff employee has filed this action against defendant employer under Title VII of the Civil Rights Act of 1964 to seek redress for defendant's alleged illegal sex discrimination. Plaintiff complains that she was forced to resign her position as a stewardess in February, 1968, pursuant to United's "no marriage" rule for female flight personnel. In November, 1968, United ended its "no marriage" policy, and in February, 1972, plaintiff was hired by United as a stewardess. On February 21, 1973, plaintiff, for the first time, filed a charge of discrimination against United with the EEOC. In response, the EEOC issued a right-to-sue letter to plaintiff, who then filed this action.

Pursuant to F. R. Civ. P. 12(b)(1), defendant has moved to dismiss the complaint on the ground that this court is without jurisdiction in this case under Title VII because of plaintiff's failure to file charges with the EEOC within a certain specified period of time from the date of the alleged unlawful discrimination.

Prior to the 1972 Amendments to the Act, when plaintiff was forced to resign her position, § 2000e-5(d) provided that in order to bring an action under this section, a person must file

a charge with the EEOC within ninety days after the occurrence of the alleged unlawful employment practice.[1] Plaintiff waited five years before filing her charge. The requirement that one complaining of discrimination on the basis of sex must invoke the administrative process within the time limitations set forth in 42 U. S. C. § 2000e-5 is a jurisdictional precondition to the commencement of a court action. *Choate* v. *Caterpillar Tractor Company*, 402 F. 2d 357, 359 (7th Cir. 1968). Plaintiff agrees, but argues that in this case there exists a "continuing violation" brought about by United's current refusal to credit plaintiff with any seniority prior to her employment in February, 1972. Plaintiff asserts that by defendant's denial of her seniority back to the starting date of her original employment in 1966, United is currently perpetuating the effect of past discrimination.

Plaintiff, however, has not been suffering from any "continuing" violation. She is seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation. The fact that that resignation was the result of an unlawful employment practice is irrelevant for purposes of these proceedings because plaintiff lost her opportunity to redress that grievance when she failed to file a charge within ninety days of February, 1968. United's subsequent employment of plaintiff in 1972 cannot operate to resuscitate such a time-barred claim.

Accordingly, defendant's motion to dismiss is granted, and the complaint is hereby dismissed.

ENTER:

/s/ BERNARD M. DECKER
United States District Judge

Dated: April 9, 1975.

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1. By Act of March 24, 1972, Pub. L. 92-261, § 4(a), 86 Stat. 103, former subsection (d) was relettered to (e), and the time for filing charges was extended from ninety days to one hundred and eighty days.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLYN J. EVANS,
Plaintiff,
vs.
UNITED AIR LINES, INC.,
Defendant.
No. 74 C 2530

NOTICE OF APPEAL

Notice is hereby given that Carolyn J. Evans, plaintiff above named, by and through her attorneys, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order dismissing the complaint, entered in this action on the 9th day of April, 1975.

Dated: May 5, 1975

DORFMAN, DE KOVEN, COHEN & LANER
Attorneys for Plaintiff
By: /s/ ALAN M. LEVIN

DORFMAN, DE KOVEN, COHEN & LANER
Attorneys for Plaintiff
One IBM Plaza, Suite 3301
Chicago, IL 60611
(312) 467-9800

Per Curiam Opinion
(Judge Cummings Dissents)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 29, 1976

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. ARLIN M. ADAMS, *Circuit Judge**
HON. ROBERT A. SPRECHER, *Circuit Judge*

CAROLYN J. EVANS,
Plaintiff-Appellant,

No. 75-1481 *vs.*

UNITED AIR LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 C 2530

Bernard M. Decker, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* Honorable Arlin M. Adams, Cirucit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1481

CAROLYN J. EVANS,
Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois.

74-C-2530

BERNARD M. DECKER, *Judge*

Argued November 6, 1975—Decided January 29, 1976

Before CUMMINGS, ADAMS,* and SPRECHER, *Circuit Judges.*

PER CURIAM:—This suit was brought by Carolyn J. Evans, under Title VII of the Civil Rights Act of 1964,[1] to recover seniority and back pay that she claims she has lost because of her separation from employment with United Air Lines. The complaint alleged that United discriminated against Evans in February, 1968, when United, by reason of Evans' marriage forced her to resign her employment as a stewardess, and that the effect of the termination is a continuing one, perpetuated by

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1. 42 U. S. C. § 2000e *et seq.* (Supp. III 1973).

the current policies of United which for seniority purposes consider only continuous time in service.

Evans was employed by United as a stewardess from November, 1966 until February, 1968, when she involuntarily resigned. During that period it was the policy of United that marriage disqualified a woman from continuing her employment as a stewardess. On November 7, 1968, United discontinued its policy of requiring stewardesses to remain unmarried,[2] and on February 16, 1972, Evans was again hired as a new employee of United. She was provided stewardess training for newly hired employees which she completed on March 16, 1972.

Evans' charge of discrimination was filed with the EEOC on February 21, 1973—five years after her termination from employment, and more than four years after United eliminated its no-marriage rule. She had not filed any prior charge of discrimination with the EEOC, or with any other governmental agency, or in any way challenged United's no-marriage rule.

United took the position that a timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to

2. United, by letter agreement of November 7, 1968 with a collective bargaining agent, agreed to reinstate those stewardesses who had been terminated under the no-marriage rule and who had filed charges or grievances. Every stewardess desirous of reinstatement was required to make application within thirty days of notification of this agreement. Evans did not qualify for reinstatement under this agreement because she had not filed a prior charge of discrimination against United with the EEOC or any state agency, nor had she filed a grievance under the applicable collective bargaining agreement.

By an October 16, 1969 letter agreement United undertook to reinstate those stewardesses who had transferred to ground positions because of the no-marriage rule and who were employed by United on that date. Evans acquired no right under the letter agreement of October 16, 1969 inasmuch as she had not transferred to a ground position and was not an employee with United as of October 16, 1969.

United's no-marriage policy for stewardesses was held unlawfully discriminatory in Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 3 FEP Cases 621 (7th Cir.), *cert. denied*, 404 U. S. 991 (1971).

filing a civil action under Title VII. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357, 359, 1 FEP Cases 431, 433, 69 LRRM 2486 (7th Cir. 1968). Therefore it moved to dismiss the complaint on the ground that Evans had failed to file a charge with the EEOC within ninety days of the alleged unlawful practice[3] which occurred in February, 1968, United claimed, when Evans was forced to resign as a stewardess and her employment and seniority were terminated. The district court granted United's motion to dismiss the complaint on the ground that plaintiff "has not been suffering from any 'continuing' violation" and is "seeking to have the court merely reinstate the November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation."

Evans appeals and we affirm.

I.

Evans claims that a current employment practice or policy, though facially neutral, is unlawful if by its operation it enables prior discrimination to reach into the present, and thus prolongs the effect of such prior discrimination. She also contends that where the challenged employment practice is current and continuing, the usual procedural requirement of Title VII, that an EEOC charge "be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," is inapplicable. Evans appears to argue that where the practice is a persistent one, a charge filed at any time during the practice's continuance is *ipso facto* timely.

Her charge would not be timely and the jurisdictional prerequisites to a civil action would not be fulfilled under the Civil Rights Act, Evans concedes, unless her theory of a continuing violation is valid. Evans also concedes that United's current

3. Prior to the 1972 Amendments of the Civil Rights Act, 42 U. S. C. § 2000e-5(e) provided that in order to bring an action under this section, a person must file a charge with the EEOC within ninety days after the occurrence of the alleged unlawful employment practice.

seniority policy is facially neutral with respect to sex,[4] and she does not contend that United still discriminates against females by reason of any current no-marriage policy. She does maintain however, that United's discriminatory termination in February, 1968 caused her to lose her seniority and, as a result of both that termination and United's on-going seniority policy, she suffers a discriminatory loss of seniority and related benefits, including pay, to the present date.

On the other hand, United asserts that the only legally cognizable injury to Evans was her termination of employment and seniority in February, 1968. That she was subsequently hired as a new employee cannot alter the fact, United asserts, that Evans lost her former seniority when she was terminated. It was this termination, in 1968, which began the running of the time limit with respect to the loss of her employment and associated benefits, according to United's theory of the case.

United argues that if a discriminatory act is considered to continue for so long as there is some lingering effect, every alleged discriminatory act could be litigated at any time. An alleged discrimination, United reasons, would never be final, despite the limitation period under section 2000e-5(e), since there might always be some lingering effects—monetary or otherwise.

II.

In *Collins* v. *United Airlines*, 541 F. 2d 594 (9th Cir. 1975), decided after the judgment here was entered by the district court, the plaintiff, a stewardess for United, was required to resign in 1967 because of United's no-marriage rule. In 1971, more than four years after her resignation, she filed

4. United's policy of crediting toward seniority only *continuous* time in service works to the disadvantage of rehired employees. A new employee who was hired in the interim between the rehired employee's termination and rehiring will have greater seniority than the rehired employee, although the new employee may have less total time in service. This policy would seem to be neutral, however, as between male and female employees.

a charge with EEOC, contending like Evans, that she had been terminated improperly under Title VII. Collins argued that her complaint was timely filed because the alleged violation was a continuing one, since United had steadfastly denied to her all employment privileges, including her prior seniority. The district court dismissed on the basis of untimeliness. In affirming the district court, the Court of Appeals for the Ninth Circuit stated:

> We cannot accept Collins' argument that her continuing non-employment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, it is the alleged unlawful act or practice—not merely its effects—which must have occurred within 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period.

The major difference between the *Collins* case and the case at hand is that Evans was re-employed as a stewardess several years after her original employment and her original cause of action had ended, whereas Collins was not re-employed. Evans argues that the violation here is a continuing one because United's current practice is to deny her seniority credit for the period prior to 1972.

Evans would have this Court find a present discrimination when the adverse effect of a past discrimination is still felt because of a current policy of the employer, even though such current policy is not discriminatory with respect to sex.[5] This is congruent with the thesis that the Ninth Circuit specifically declined to accept in *Collins* when it stated that "the alleged unlawful act or practice—not merely its effects— . . . must

5. Such a holding, however, might well discourage an employer from re-hiring a worker against whom it had discriminated previously. This reluctance would stem from both the direct burden of additional costs associated with such an employee and the fear of disruption of the employer's relations with other employees who might consider themselves to be unfairly disadvantaged, in terms of the regular and neutral seniority program, relative to the rehired employee.

have occurred within [the statutory period] preceding the filing of charges before the EEOC."[6]

In Waters v. Wisconsin Steel Works, 502 F. 2d 1309 (7th Cir. 1974), *petition for cert. filed*, 44 LW 3037 (U. S. Feb. 24, 1975 (No. 74-1064), this Court adopted essentially the same rationale that the Ninth Circuit employed in *Collins*. Wisconsin Steel had engaged in racially discriminatory hiring practices, but in 1964 it began to hire black bricklayers, including Waters, who was hired in July. When business slackened in September, 1964, Waters was among those laid off, pursuant to a "last hired, first fired" seniority system. Waters contended that this seemingly neutral policy of last hired, first fired served to perpetuate past discrimination because recently hired blacks were disadvantaged relative to whites who might not have had greater seniority but for the prior discriminatory hiring practices. Waters' argument was rejected by this Court, which stated:

> Wisconsin Steel's employment seniority system embodying the "last hired, first fired" principle of seniority is not

6. *Accord*, Buckingham v. United Air Lines, 11 FEP Cases 344 (C. D. Cal. 1975) (dictum), decided independently of *Collins*. In *Buckingham* eight stewardesses alleged discriminatory terminations or transfers to ground positions by United pursuant to its no-marriage policy. The stewardesses filed charges within 90 days of the agreement between their union and United rescinding the "no-marriage" policy, see note 2 supra, but more than 90 days after the allegedly discriminatory transfers and terminations. The stewardesses contended that the agreement, which restored no rights to them, perpetuated the effects of the prior discrimination and was, therefore, discriminatory in itself. The district court decided that the transfers and terminations in question were not discriminatory in fact, and also concluded that:

> [e]mployer action . . . such as the termination or transfer of an employee . . . constitutes a 'completed act' at the time it occurs, and unless a charge of discrimination is filed with the Equal Employment Opportunity Commission within the completed time period following the completed act, an action under Title VII is barred.

11 FEP Cases at 349.

> of itself racially discriminatory [n]or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII.[7]

The *Waters* decision adjudicated more issues than this one. But the seniority issue was not insignificant in *Waters* and this Court appears to have concluded that detriments that stem from the interaction of a prior discrimination and a seniority policy that is not discriminatory in itself cannot be deemed to be proximately caused by the prior discrimination.

The holding in *Waters* must inform our decision here.[8] United's seniority policy in itself is not discriminatory with respect to sex.[9] A policy which is neutral cannot be said to perpetuate past discriminations in the sense required to constitute a current violation of Title VII. If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termination alone, however, would be

7. 502 F. 2d at 1318. This holding is distinct from another portion of Waters in which a "present perpetuation of the racial discrimination of the past" was found. There an amendment to the regular seniority policy, which favored only eight specific whites who had previously worked for the company but who had cut all ties with the firm by accepting severance pay, was determined to be an expression of a discriminatory policy in the circumstances of the case. 502 F. 2d at 1320-21, *petition for cert. filed sub nom.* Bricklayers and Stone Masons, Local 21 v. Waters, 44 LW 3038 (U. S. Apr. 25, 1975) (No. 74-1350). Unlike the Wisconsin Steel Works, however, United does not appear to have deviated from its regular, and neutral, seniority policy in its dealings with Evans.

8. But see Tippett v. Liggett & Meyers Tobacco Co., 316 F. Supp. 292 (N. D. N. C. 1970); EEOC Dec. No. 71-413, 3 FEP Cases 233 (1970). Two of the cases emphasized by Evans—Burwell v. Eastern Airlines, 394 F. Supp. 1361, 10 FEP Cases 882 (E. D. Va. 1975), and Marquez v. Omaha District Sales Office, 440 F. 2d 1157, 3 FEP Cases 275 (8th Cir. 1971)—involved continuing employer policies discriminatory in themselves, whereas in the present case the current seniority policy of United is neutral on its face with regard to sex.

9. See note 4 *supra* and accompanying text.

barred for failure to file a charge relating to the termination within the statutorily required period.

Accordingly, the judgment of the district court is affirmed.

CUMMINGS, *Circuit Judge* (dissenting):—With due respect, I dissent. The gravamen of the complaint is that United has continued to fail to credit plaintiff with prior seniority. This is a current practice of defendant and results in plaintiff's receiving less seniority than male stewards hired between her February 1968 illegally forced resignation and her February 1972 reemployment. The majority, incorrectly I believe, holds that this suit, filed in 1973, is barred by the pertinent statute of limitations, 42 U. S. C. § 2000e-5(e).[1] However, as we held in *Cox* v. *United States Gypsum Company*, 409 F. 2d 289 (7th Cir. 1969), and again in *Bartmess* v. *Drewrys U. S. A., Inc.*, 444 F. 2d 1186, 1188 (7th Cir. 1971), certiorari denied, 404 U. S. 939, the limitation contained in what is now Section 2000e-5(e) is no bar when a continuing practice of discrimination is being challenged.

The issue then is whether defendant's policy is an act of continuing discrimination. In analyzing this issue the threshold question the court should ask is: does Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e et seq.) impose an obligation upon the employer which was allegedly violated by the challenged policy at the time plaintiff instituted this action? To determine whether there was a violation, it should next consider whether the challenged facially neutral policy gives collateral effect to a past act of discrimination, and, if so, whether the past act of discrimination is the proximate cause of the disparity complained of by plaintiff. If these conditions have been met, the plaintiff has proven discrimination in violation of Title VII. See *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 236

1. The predecessor Section 2000e-5(d) required that a charge be filed with the EEOC within 90 days after the occurrence of the unlawful practice. In 1972, the period was extended to 180 days.

(5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354 (8th Cir. 1973).

Applied to the facts of this case, this analysis inexorably results in the conclusion that United's failure to credit plaintiff with back seniority is a current act of discrimination. Clearly, Title VII requires employers to determine an employee's seniority on a non-discriminatory basis. See 42 U. S. C. § 2000e2(h); *United States* v. *N. L. Industries, supra*. Because plaintiff's seniority is being measured from the date of her re-employment, defendant's policy gives collateral effect to its past act of discrimination, *viz.*, plaintiff's illegal termination. That 1968 wrongful act is the proximate cause of the existing disparity between plaintiff's wages and working conditions and those of male stewards hired between February 1968 and February 1972. Defendant is thus presently perpetuating the effects of its past discrimination. Plaintiff's charge was therefore timely filed and the district court had jurisdiction of her action. *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359 (7th Cir. 1968).

The Equal Employment Opportunity Commission considered plaintiff's charge to be timely, and its interpretation of the time limitation contained in 42 U. S. C. § 2000e-5(e) deserves deference. *Cox* v. *United States Gypsum Company*, 409 F. 2d 289, 291 (7th Cir. 1969). This view of timeliness has judicial and administrative support.

In *Burwell* v. *Eastern Air Lines, Inc.*, 394 F. Supp. 1361, 1367 (E. D. Va. 1975), stewardess Burwell was terminated for pregnancy. Seven months later she was reinstated with loss of seniority. Although Eastern had changed its maternity policy prior to suit, Judge Merhige held that her EEOC charge almost three years after her return to Eastern was a timely filing with the EEOC because of her continuing loss of seniority. His reasoning is similar to that adopted earlier by the Commission in a case on all fours with the one at bar. EEOC Doc. No. 71-413, 3 FEP Cases 233 (1970). We should pay heed to its construction of Title VII (*Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434, *Choate*

v. *Caterpillar Tractor Co., supra* 402 F. 2d at 360) and therefore require United to bridge plaintiff's seniority. See *Marquez* v. *Omaha District Sales Office,* 440 F. 2d 1157, 1159-1160 (8th Cir. 1971); *Tippett* v. *Liggett & Myers Tobacco Co.,* 316 F. Supp. 292, 295-296 (M. D. N. C. 1970); *Healen* v. *Eastern Air Lines,* 8 FEP Cases 917 (N. D. Ga. 1973).

Defendant maintains a present bias by enabling its past bias to reach into the present through its seniority practice. United should not be able now to penalize the victim of its prior discrimination.[2]

The cases relied on by the majority are readily distinguishable. In *Collins* v. *United Airlines,* 514 F. 2d 594 (9th Cir. 1975), plaintiff sought reinstatement several years after she had been terminated pursuant to United's "no marriage" rule. The alleged continuing discrimination in *Collins* was the failure to rehire plaintiff. Title VII, however, imposes no obligation on the employer to hire anyone unless the refusal is motivated by discrimination. There was no evidence in *Collins* that the decision not to rehire the plaintiff was based at all upon the past act of discrimination. In *Buckingham* v. *United Airlines,* 11 FEP Cases 344, 345 (C. D. Cal. 1975), the court specifically found that plaintiffs' terminations or transfers were not caused by the no marriage rule or any other act of discrimination. Finally, *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309 (7th Cir. 1974), is inapposite. In that case, the plaintiffs failed to show that the prior discrimination was the proximate cause of their layoffs.

I would reverse.

2. The majority's fear that a finding of continuing discrimination in this case would discourage the re-employment of wronged employees is not warranted. After her termination, the plaintiff here filed a grievance with the Union. United's decision to rehire her resulted from Union pressure, which would have been applied without regard to our holding in this case.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 6, 1976

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. ARLIN M. ADAMS, *Circuit Judge**
HON. ROBERT A. SPRECHER, *Circuit Judge*

CAROLYN J. EVANS,
Plaintiff-Appellant,

No. 75-1481 *vs.*

UNITED AIR LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74-C-2530

Bernard M. Decker, Judge.

ORDER

The plaintiff-appellant's petition for rehearing is granted.

* The Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

On Petition for Rehearing
Opinion by Judge Adams

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 26, 1976

Before
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. ARLIN M. ADAMS, *Circuit Judge**
HON. ROBERT A. SPRECHER, *Circuit Judge*

CAROLYN J. EVANS,
Plaintiff-Appellant,

No. 75-1481 *vs.*

UNITED AIR LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 C 2530

Bernard M. Decker, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed and Remanded, with costs, in accordance with the opinion of this Court filed this date.

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IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1481

CAROLYN J. EVANS,
Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division 74-C-2530
BERNARD M. DECKER,
Judge.

On Petition for Rehearing

ARGUED NOVEMBER 6, 1975—DECIDED APRIL 26, 1976

Before CUMMINGS, ADAMS* and SPRECHER, *Circuit Judges.*

ADAMS, *Circuit Judge.* This suit was brought by Carolyn J. Evans, under Title VII of the Civil Rights Act of 1964,[1] to recover seniority and back pay that she allegedly lost because of her separation from employment with United Air Lines. The complaint claims that United discriminated against Evans in February, 1968, when United, by reason of Evans' marriage, forced her to resign her employment as a stewardess. She also asserts, however, a continuing discrimination against her as a

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1. 42 U. S. C. § 2000e *et seq.* (Supp. III 1973).

result of the current application of United's seniority policies, which consider only continuous time-in-service and thereby perpetuate the adverse effects of the original discriminatory discharge.

Evans was employed by United as a stewardess from November, 1966 until February, 1968, when she involuntarily resigned. During that period it was the policy of United that marriage disqualified a woman from continuing her employment as a stewardess. On November 7, 1968, United discontinued its policy of requiring stewardesses to remain unmarried,[2] and on February 16, 1972, Evans was again hired as a new employee of United. She was provided stewardess training for newly hired employees, which she completed on March 16, 1972.

Evans filed a charge of discrimination with the EEOC on February 21, 1973—five years after her termination from employment, and more than four years after United eliminated its no-marriage rule. She had not filed any prior charge of discrimination with the EEOC, or with any other governmental agency, or in any way challenged United's no-marriage rule.

2. United, by letter agreement of November 7, 1968 with a collective bargaining agent, agreed to reinstate those stewardesses who had been terminated under the no-marriage rule and who had filed charges or grievances. Every stewardess desirous of reinstatement was required to make application within thirty days of notification of this agreement. Evans did not qualify for reinstatement under this agreement because she had not filed a prior charge of discrimination against United with the EEOC or any state agency, nor had she filed a grievance under the applicable collective bargaining agreement.

By an October 16, 1969 letter agreement, United undertook to reinstate those stewardesses who had transferred to ground positions because of the no-marriage rule and who were employed by United on that date. Evans acquired no right under the letter agreement of October 16, 1969 inasmuch as she had not transferred to a ground position and was not an employee with United as of October 16, 1969.

United's no-marriage policy for stewardesses was held unlawfully discriminatory in *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir.), *cert. denied*, 404 U. S. 991 (1971).

United took the position that a timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to filing a civil action under Title VII. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357, 359 (7th Cir. 1968). Therefore it moved to dismiss the complaint on the ground that Evans had failed to file a charge with the EEOC within ninety days of the alleged unlawful practice[3] which occurred in February, 1968, United claimed, when Evans was forced to resign as a stewardess and her employment and seniority were terminated.

The district court granted United's motion to dismiss the complaint on the ground that plaintiff "has not been suffering from any 'continuing' violation" and is "seeking to have the court merely reinstate the November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation."

Evans brought this appeal. After argument, the Court affirmed the dismissal by the trial court, relying upon an interpretation of *Waters* v. *Wisconsin Steel Works*.[4] Petitions for rehearing by the panel and *en banc* were filed. Pending the consideration of those petitions, the Supreme Court decided *Franks* v. *Bowman Transportation Co.*[5] In view of the Supreme Court's decision, rehearing was granted by the panel on April 6, 1976. We now reverse and remand.

I.

Evans claims that a current employment practice or policy, though facially neutral, is unlawful if by its operation it enables prior discrimination to reach into the present, and thus prolongs the effect of such discrimination. She also contends that where

3. Prior to the 1972 Amendments of the Civil Rights Act, 42 U. S. C. § 2000e-5(e) provided that in order to bring an action under this section, a person must file a charge with the EEOC within ninety days after the occurrence of the alleged unlawful employment practice.

4. 502 F. 2d 1309 (7th Cir. 1974), *pet. for cert. filed*, 44 U. S. L. W. 3037 (U. S., Feb. 24, 1975) (No. 74-1064).

5. 44 U. S. L. W. 4356 (U. S. Mar. 24, 1976).

the challenged employment practice is current and continuing, the usual procedural requirement of Title VII, that an EEOC charge "be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," is inapplicable. Evans appears to argue that where the practice is a persisent one, a charge filed at any time during the continuance of the practice is *ipso facto* timely.

Her charge would not be timely and the jurisdictional preequisites to a civil action would not be fulfilled under the Civil Rights Act, Evans concedes, unless her theory of a continuing violation is valid. Evans also concedes that United's curent seniority policy is facially neutral with respect to sex,[6] and she does not contend that United still discriminates against females by reason of any current no-marriage policy. She does maintain however, that United's discriminatory termination in February, 1968 caused her to lose her seniority and, as a result of that termination in combination with United's on-going seniority policy, she suffers a discriminatory loss of seniority and related benefits, including pay, to the present date.

On the other hand, United asserts that the only legally cognizable injury to Evans was her termination of employment and seniority in 1968. In this respect, United's argument would appear to rest, *sub silentio*, on the protection afforded bona fide seniority systems by section 2000e-2(h). That section provides:

> Notwithstanding any other provision of this sub-chapter, it shall not be an unlawful employment pactice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system. . . .

6. United's policy of crediting towardseniority only *continuous* time-in-service works to the disadvantae of rehired employees. A new employee who was hired in the interim between the former employee's termination and rehiring will have greater seniority than the rehired employee, although the new employee may have less total time-in-service. This policy would seem to be neutral, however, as between male and female employees.

Since it is agreed that United's continuous-time-in-service seniority system is facially neutral with regard to sex, the present application of the seniority policy to Evans is not a violation of Title VII, according to United. Rather, in their view of the case, any actionable injury to Evans stems from her termination in February, 1968, whereby she lost her initial seniority. And it was from such date that the time limit began to run, and has long-since expired, with respect to any disadvantages in employment-related benefits.

United argues that if a discriminatory act is considered to continue for so long as there is some lingering effect, every alleged discriminatory act could be litigated at any time. A discrimination, United reasons, would never be final, despite the limitation period under section 2000e-5(e), since there might always be some lingering effects—monetary or otherwise.

II.

The Supreme Court addressed the scope of the neutral-seniority-policy defense set forth in section 2000e-2(h) in *Franks* v. *Bowman Transportation Co.*[7] The Court in *Franks* was asked to determine whether Section 2000e-2(h) (section 703(h) of the Civil Rights Act of 1964) precluded the grant of retroactive seniority as a form of relief to job applicants who had not been hired because of racial discrimination. It held that such relief was appropriate, despite a facially neutral seniority policy, where the individual complainants could prove that they had been the actual victims of discriminatory hiring practices.[8] The decision was predicated upon the Supreme Court's conclusion

7. 44 U. S. L. W. 4356 (U. S. Mar. 24, 1967).

8. *Id.* at 4359, 4361, 4363. This Court's decision in *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (7th Cir. 1974), *pet. for cert. filed.* 44 U. S. L. W. 3037 (U. S., Feb. 24, 1975) (No. 74-1064), would not appear to be to the contrary. In *Waters*, the employees do not seem to have established a causal linkage between their seniority status, which resulted in their lay-offs, and specific acts of discrimination directed at them personally.

that section 2000e-2(h) was intended to protect only those seniority rights that were established prior to the effective date of Title VII in 1965:[9]

> [W]hatever the exact meaning and scope of § 703(h) in light of its unusual legislative history and the absence of the usual legislative materials, . . . it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.

As the Supreme Court observed, Congress is well aware that employment discrimination is a "complex and pervasive phenomenon."[10] The House report on the Equal Employment Opportunity Act Amendments of 1972 notes that

> Experts familiar with the subject generally describe the problem in terms of "system" and "effect" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority in lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. . . . Particularly to the untrained observer their discriminatory nature may not appear obvious at first glance.[11]

The Supreme Court reiterated in *Franks* that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity. . . ."[12]

"[O]ne of the central purposes of Title VII is to make persons whole for injuries suffered on account of unlawful employment

9. *Id.* at 4360.

10. *Id.* at 4361 n. 21.

11. H. Rep. No. 92-238, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U. S. Code, Cong. & Admin. News 2137, 2144.

12. 44 U. S. L. W. at 4360.

discrimination," the Court said.[13] Therefore, it concluded that "[a]dequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position of the seniority system that would have been his had he been hired at the time of his application."[14]

III.

It is in the context of the *Franks* decision that we must consider whether Evans' complaint was filed within 90 days of a violation of Title VII, thus affording jurisdiction to the district court. More specifically, the issue is whether section 2000e-2(h) may be used to interpose a legal bar to Evans' theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuing violation of her Title VII rights.

A seniority policy that credits only continuous time-in-service necessarily has an adverse impact on rehired employees who have more total time-in-service, but less continuous time-in-service, than newly hired employees. This disadvantaged class of rehired employees may include employees who were rehired subsequent to terminations that resulted from prior discriminatory practices. Evans claims to be an employee of the latter type.

It is apparent that United's continuous-time-in-service seniority program may put an employee who has been discharged and later rehired into an inferior seniority position than would have been the case if the employees had not been discharged and, thereby, perpetuates some of the disadvantages resulting from the prior discharge. If the prior discharge was itself a discriminatory one, then United's seniority policy is an instrument that extends the impact of past discrimination, albeit unintentionally. Consequently, the present application of United's seniority policy is deemed to be discriminatory. It has been held in a

13. *Id.*

14. *Id.* at 4361.

number of instances that a facially neutral seniority policy may be in violation of Title VII if its effect is to perpetuate the disadvantages accruing from prior discrimination.[15]

The teaching of *Franks* confirms these holdings. Section 2000e-2(h) must be understood as relatively narrow, although necessary, exception to the Congressional intent to prohibit all practices of whatever form that create inequalities. It applies only to seniority rights vesting before the 1965 effective date of Title VII. United's seniority program, however, transmits into the present the disadvantages allegedly resulting from a 1968 discrimination. In these circumstances, section 2000e-(h) cannot be used to erect a legal bar to Evans' claim that she is the victim of a current discrimination as a result of a present seniority practice that imposes upon her the effects of a past employment discrimination by United.

For the above reasons, we conclude that Evans' complaint, having been filed during the pendency of the alleged discrimination, was not time-barred. Accordingly, we reverse and remand the cause to the district court for action consistent with this opinion.

15. *Acha* v. *Beame*, ... F. 2d ..... (2d Cir. 1976); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 236 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354 (8th Cir. 1973); *Tippett* v. *Liggett & Meyers Tobacco Co.*, 316 F. Supp. 292 (M. D. N. C. 1970); *Healen* v. *Eastern Air Lines*, 8 FEP Cases 917 (N. D. Ga. 1973); EEOC Dec. No. 71-413, 3 FEP Cases 233 (1970). *See Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971), where the Supreme Court declared:

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 7, 1976

Before:

HON. WALTER J. CUMMINGS, *Circuit Judge*,
HON. ARLIN M. ADAMS,* *Circuit Judge*,
HON. ROBERT A. SPRECHER, *Circuit Judge*.

No. 75-1481.

CAROLYN J. EVANS,
Plaintiff-Appellant,

vs.

UNITED AIR LINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition of the appellee, United Air Lines, Inc., for a hearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing.

IT IS ORDERED that the petition of the appellee for a rehearing in the above-entitled appeal be, and the same is hereby denied.

* The Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

Table Of Authorities

Cases

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,
Petitioner,

vs.

CAROLYN J. EVANS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Carolyn J. Evans respectfully urges that the Petition for a Writ of Certiorari filed herein by United Air Lines, Inc. (hereinafter "United") be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Where an employer's current seniority practice treats that employer's prior discriminatory termination of a reinstated former employee as a break in service, thereby creating a current loss of seniority, a current disparity, and a perpetuation of the effects of the prior discrimination, can that current seniority practice be held violative of Title VII of the Civil Rights Act of 1964 as to that employee?

2. Is the denial, by order of the Court of Appeals, of a simple motion to dismiss the complaint, ripe for review by this Court at this time?

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter the "Act"), 42 U.S.C. §2000e *et seq.*, specifically Sections

703(h), 706(e) and 706(g) thereof (42 U.S.C. §§2000e-2(h), 2000e-5(e), and 2000e-5(g)). These sections are set forth in their entirety at Appendix, p. 6a.

STATEMENT OF THE CASE

Respondent Evans wishes to add the following to the summary of the parties' respective positions offered by United in its Statement of the Case.

1. Carolyn Evans does not seek that back pay which was lost solely as a result of United's unlawful termination of her in 1968; rather, she seeks seniority credit which she is currently being denied due to United's reliance upon her 1968 termination as a break in her service for current seniority purposes. The back pay and other relief sought in addition to seniority credit are limited to those benefits, wages, or perquisites which Mrs. Evans would have enjoyed since February 16, 1972 had she not been victimized by United's current practice with respect to her seniority, and were she instead being credited with seniority from her original date of hire and for all periods she has actually worked for United.

2. It is somewhat misleading to state that Mrs. Evans simply seeks a restoration of seniority she "lost . . . in 1968", because seniority has meaning only in an on-the-job context. Carolyn Evans argued below, and the Court of Appeals accepted her position, that a "loss" has occurred and has been implemented on every day of her re-employment, continues to the present, and will continue tomorrow unless checked. For example, whenever United determines Mrs. Evans' wages, her flight assignments, her fringe benefits, and whether or not she is to be laid off or recalled, it engages in its seniority practice. Each time, United has admittedly chosen to treat the 1968 termination as a break in service, and by currently relying on that

past act, it has inexorably tied that past discrimination[1] to its present treatment of Mrs. Evans' seniority. Thus, Mrs. Evans' theory of relief, advanced both in District Court and on appeal, and accepted by the Court of Appeals, consists of two premises:

(a) That the "continuing practice" challenged is that ongoing seniority practice (the "continuing discrimination"), and that her charge was timely filed with respect thereto; and

(b) That said practice is *illegal* because it perpetuates the effects of past discrimination, and actively enables prior discrimination to reach effectively into the present. (Mrs. Evans thus finds herself with less seniority, fewer benefits, and less protection against layoff, than similarly situated males: i.e., males hired at the same time or later than she originally was, and males with the same or less actual length of service with United.)

3. As this case has arisen on a motion to dismiss the Complaint, said pleading is reproduced herein (without Exhibits) and appears at Appendix, p. 1a. United's Statement of the Case failed to note that Mrs. Evans filed a grievance protesting United's seniority practice on October 16, 1972.[2] Said grievance was denied. (Para. IX of the Complaint.)[3]

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[1] The "no-marriage rule" for stewardesses, which occasioned the 1968 termination, was found to be violative of Title VII in *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir., 1971) *cert. denied*, 404 U.S. 991 (1971).

[2] We are prepared to prove, if necessary, that Mrs. Evans was treated as a probationary employee when she was reinstated, and that her grievance was filed shortly after that probationary period expired.

[3] Upon consent order of the Magistrate, Mrs. Evans also filed a Reply to the Answer, in lieu of an Amended Complaint, stating that state administrative remedies had been exhausted through the EEOC deferral process.

4. Mrs. Evans takes issue with several other of the characterizations of the case and the parties' arguments below, as well as conclusions of law, made in United's Statement of the Case. However, since these matters are more appropriately the subject of argument, they will be dealt with in the Argument portion of this Brief.

REASONS THE WRIT SHOULD NOT BE GRANTED

1. The decision of the Seventh Circuit Court of Appeals will have no deleterious effect on the time limitation set forth in Section 706(e) of the Act, and is in fact in conformity with the plain language of the Act and established case law. Rather, a reversal of the Court of Appeals' decision would unsettle employment discrimination law heretofore fashioned and established by the Courts over the last decade, and would conflict with both this Court's earlier pronouncements in employment discrimination cases under the Act and Congress' apparent purpose as reflected in the Act.

2. The decision below is both logical and well-grounded in established case law. It does not create a conflict among the Circuits; *Collins* v. *United Air Lines, Inc.*, 514 F.2d 594 (9th Cir., 1975), is clearly distinguishable and creates no anomaly between the rights of former employees who are rehired and those who are not.

3. The Seventh Circuit's decision is entirely consistent with this Court's reasoning in *Franks* v. *Bowman Transportation Co.*, 424 U.S. ....., 96 S.Ct. 1251 (1976) and its action in other cases.

4. As this case arises on a motion to dismiss, and the Court of Appeals' decision effects simply a denial of said motion and remand for trial, the decision has become interlocutory in nature and is not a final disposition of

the case; the case is therefore not ripe for review, since review is not necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. *American Construction Company* v. *Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967). *See* also, *Liberty Mutual Insurance Co.* v. *Wetzel*, ... U.S. ....., 96 S.Ct. 1202 (1976).

SUMMARY OF ARGUMENT

As the Court of Appeals correctly reasoned, the issue in this case is not whether Mrs. Evans' EEOC charge was timely filed. Since the employment practice here being directly challenged is United's current seniority practice with respect to Mrs. Evans (not the 1968 termination), and since the charge was timely filed with respect to that seniority practice, the real issue here is whether or not that challenged seniority practice is illegal.

The Court of Appeals correctly concluded that said practice is illegal because it perpetuates and actively gives present effect to prior post-Act discrimination against Mrs. Evans—namely, her prior illegal termination. This is so because United today relies on that termination as a break in service. *Collins* is distinguishable because there, the refusal to hire was not based on prior discrimination, nor was it even alleged to be. Here, the current practice is admittedly based on prior discrimination. The two cases are thus compatible.

Moreover, as this Court reasoned in *Franks*, Section 703(h) of the Act cannot operate as a bar to Mrs. Evans' claim, since the prior discrimination involved here was post-Act rather than pre-Act. And this Court's dictum in *Franks* confirms the soundness of the analysis set forth above and utilized by the Court of Appeals.

ARGUMENT

I

The Time Limit Of Section 706(e) (Formerly 706(d)) Was Satisfied In This Case

At the time Mrs. Evans filed her EEOC charge herein[4] (February 21, 1973), Section 706(e) of the Act required her to file within 180 days of the occurrence of the alleged unlawful employment practice. Mrs. Evans did so. There has therefore been no departure from the plain language of the Act.

The "employment practice" here being challenged is United's seniority practice with respect to Mrs. Evans. That practice is clearly current and continuing. It was occurring within 180 days of the day she filed her charge; indeed, it was occurring on the very day she filed her charge. She was injured by it then, is injured by it today, and will be injured by it in the future: United engages in and will engage in its challenged seniority practice whenever it makes flight assignments to Mrs. Evans, computes her paycheck, schedules her vacation, prepares to lay off or recall flight attendants, determines her pension entitlements, or utilizes "benefit"—or "competitive"—seniority in any other aspect of her employment.

The proposition, accepted by the Court of Appeals here, that a charge filed during the operation of a continuing employment practice or policy is timely, has been firmly established.

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[4] As the Court of Appeals was informed at oral argument, the Commission accepted jurisdiction of Mrs. Evans' charge as timely.

Congress clearly anticipated and provided for the possibility that there could be "continuing violations" and that a charge could be timely filed over 180 days after the *commencement* of a practice but during the ongoing operation thereof. This is the clear import of the provision, in Section 706(g) of the Act (Appendix, p. 7a) that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." For the quoted provision would have meaning only in a case such as this—where the challenged practice or policy, and the injury resulting therefrom, are of a continuing nature.

That this was in fact the true Congressional intent is confirmed by the legislative history of the 1972 Amendments to Title VII. The Committee Report adopted by both the House and the Senate contained the following language in reference to §706(e) (the time limits provision):

> "This subsection provides that charges be filed within 180 days [or 300 days if proceedings are filed with a state or local agency] of the alleged unlawful employment practice. *Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued,* and other interpretations of the courts maximizing the coverage of the law is not affected." 118 Cong. Rec. 7167 (Senate, March 6, 1972); 118 Cong. Rec. 7565 (House, March 8, 1972). (Emphasis added.)

In accepting Mrs. Evans' theory of timeliness based upon the existence of a continuing employment policy or practice, the Seventh Circuit acted in accordance with widely established case law on point—much of which existed when Congress amended Title VII in 1972—covering a wide variety of "continuing practice" situations (including many wherein a facially neutral seniority practice was being challenged).[5]

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[5] *Bartmess* v. *Drewrys U.S.A., Inc.,* 444 F.2d 1186 (7th Cir., 1971), *cert. den.* 404 U.S. 939 (1971); *Cox* v. *U.S. Gypsum Company,* 409 F.2d 289 (7th Cir., 1969); *Burwell* v. *Eastern Air Lines,* 394 F.Supp. 1361, 1367 (E.D.Va., 1975) (loss of seniority); *Tippett* v. *Liggett & Myers Tobacco Co.,* 316 F.Supp. 292 (M.D.N.C., 1970) (loss of seniority); *Healen* v. *Eastern Air Lines,* ..... F.Supp. ....., 8 FEP Cases 917 (N.D.Ga., 1973) (loss of seniority); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979 (D.C.Cir., 1973); *Sciaraffa* v. *Oxford Paper Co.,* 310 F. Supp. 891 (D.Me., 1970); *Kohn* v. *Royall, Koegel & Wells,* 59 F.R.D. 515 (S.D.N.Y., 1973), *app. dism.* 496 F.2d 1094 (2d Cir., 1974); *Watson* v. *Limbach Company,* 333 F.Supp. 754 (S.D.Ohio, 1971); *Jamerson* v. *Trans World Airlines,* ..... F.Supp. ....., 11 FEP Cases 1475 (S.D.N.Y., 1975) (loss of seniority); *Jamison* v. *Olga Coal Co.,* 335 F.Supp. 454 (S.D.W.Va., 1971); *Moreman* v. *Georgia Power Co.,* 310 F.Supp. 327 (N.D.Ga., 1969). Moreover, said rationale implicitly underlies the acceptance of plaintiffs' theory of relief in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), where this Court permitted continuing discriminatory practices and policies to be challenged under Title VII, and the several Court of Appeals and other cases cited in Part II of this Brief, wherein continuing seniority, transfer and other practices were challenged as illegal for perpetuating the effects of past discrimination and the time limits of the Act were implicitly assumed to be satisfied. Thus, for example, *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 795-796 (4th Cir., 1971), *cert. den.* 404 U.S. 1006 (1971) stands for the proposition that a facially neutral seniority practice which perpetuates the effects of past discrimination is in fact a continuing violation of Title VII.

As one court aptly summarized the state of the law:

> "It is clear that the filing of a charge with the EEOC within 90 days [extended to 180 or 300 days in 1972] after the alleged unlawful practice occurs is a jurisdictional prerequisite to a subsequent court suit under Title VII. . . . However, if the alleged violation is deemed to be 'continuing,' it has been consistently held that the 90 day period does not bar an ensuing court action." *Sciaraffa* v. *Oxford Paper Company,* 310 F.Supp. 891, 896 (D.Me., 1970).

Every one of the cases cited by United on pages 8 through 14 of its Brief are inapposite. Those cases stand simply for the general proposition that satisfaction of the Act's time limits is a jurisdictional prerequisite to suit. The parties agree on that score. The cited cases either involved only discharges and nothing more—unlike the case at bar, wherein a current and continuing on-the-job seniority practice has been challenged—or are otherwise easily distinguished. Thus, for example, in *Griffin* v. *Pacific Maritime Assoc.,* 478 F.2d 1118 (9th Cir., 1973), *cert. denied,* 414 U.S. 859 (1973), plaintiffs' Title VII claim was deemed barred for failure to exhaust administrative remedies since they had filed no charges at all with any appropriate agency; the other statute pursuant to which they proceeded—42 U.S.C. §§1981 and 1985—is not in issue here. In *East* v. *Romine, Inc.,* 518 F.2d 332 (5th Cir., 1975), there was apparently no allegation that the current refusal to hire was in fact *based* on the prior refusal to hire. The employer had thus not tied the past refusal to the current refusal. (The charge was therefore found timely in relation to the current refusal, and an earlier charge, filed beyond the time limit in relation to the earlier refusal, was found untimely since that was the only practice attacked in that earlier charge.)

In *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F. Supp. 195 (W.D.Va., 1969), although plaintiff contended that the discriminatory policies which gave rise to his transfer were of a "continuous" nature, his complaint attacked not those "continuous" policies (he did not apparently allege that he had been injured by them after his transfer and within the timely filing period preceding his charge) but merely directly attacked the transfer itself. His charge was untimely as to *that transfer*, the alleged unfair employment practice. Here, by contrast, Mrs. Evans is directly attacking a continuing seniority practice which is being implemented and causes injury to her today, and her charge was timely *as to that alleged unfair employment practice.*

In *Buckingham* v. *United Air Lines, Inc.*, ... F.Supp. ....., 11 FEP Cases 344 (C.D.Cal., 1975), the transfers occurred prior to the 1965 effective date of Title VII (and were thus not unlawful); furthermore, neither the pre-Act transferees nor the post-Act terminees could directly challenge the "no-marriage" rule or the agreement ending it (which was consummated within 90 days of the date they filed charges) since they could not show that they themselves were unfairly injured by the rule or the agreement within the 90-day period (the transferees were not then stewardesses and the terminees were not then employees). Similarly, the key distinction in *Kennedy* v. *Braniff Airways, Inc.*, 403 F.Supp. 707, 709 (N.D.Tex., 1975) is that there—unlike here—the past discrimination occurred *prior* to the effective date of Title VII, as the Court took pains to point out; we also note that the case pre-dates this Court's ruling in *Franks, supra.*

Lastly, *Cates* v. *Trans World Airlines*, ... F.Supp. ....., 13 FEP Cases 201 (S.D.N.Y., 1976), is entirely distinguishable on its facts: Of the three named plaintiffs,

two (Cates and George) filed EEOC charges *over a year and a half after they were laid off pursuant to the challenged seniority practice,* and the Court in fact assumed their day of layoff was the last day on which the seniority practice operated against them (13 FEP Cases at 208). As to the third (Whitehead, discussed in the passage quoted by United), the Court found that he had never actually been denied employment (13 FEP Cases at 208). Unlike Cates and George, Mrs. Evans filed charges *during* the pendency of the seniority practice, and thus was timely. And, unlike Whitehead, Mrs. Evans is an *identifiable victim* of past discrimination, and is thus entitled to relief. Furthermore, much of the District Court's reasoning in *Cates* may well be suspect in light of the Second Circuit's scholarly decision in *Acha* v. *Beame,* 531 F.2d 648 (2d Cir., 1976), which is discussed below.

In all of the other cases cited by United—with the *seeming* exception of *Collins,* discussed *infra*—the only practice being challenged was the actual discharge. None of those cases involved an attack upon a current and continuing seniority practice such as that being challenged here by an employee who is today suffering injury *on the job* because of it. That practice is a continuing one, whereas a discharge itself is not.

That distinction is critical—for, as the Eighth Circuit noted in *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir., 1975).

> "The rationale underlying the allowance of actions for continuing discrimination is to provide a remedy for past actions which operate to discriminate against the complainant at the present time."

From the very outset of this case, Mrs. Evans has conceded both that the timely filing of an EEOC charge is a

jurisdictional prerequisite to suit, and that, were she simply and solely attacking her 1968 termination, rather than a current employment practice, her claim would be time-barred. Conversely, United has never disputed the proposition that if its challenged current seniority practice is unlawful under the Act, then Mrs. Evans' EEOC charge was timely filed. Thus, the real issue here has nothing to do with time limits; rather, the question is, purely and simply, is the challenged seniority practice *unlawful*? The Court of Appeals correctly decided that issue in the affirmative.

II

United's Current Seniority Practice Is Unlawful As Applied To Mrs. Evans Because It Is Based On, And Perpetuates The Effects Of, Prior Discrimination

Carolyn Evans was no stranger to United Air Lines when she was reinstated in 1972, and United knew it. By relying on the 1968 termination as creating a break in service, and giving effect to that break in service in its current seniority practice with respect to Mrs. Evans, United is actively enabling that prior discrimination to reach effectively into the present. United thus visits new losses upon Mrs. Evans and creates a present disparity, for Mrs. Evans finds herself at a significant disadvantage as compared with male flight attendants who (1) were hired between 1966 and 1972 (i.e., at the same time or even later than she originally was) and/or (2) have less actual length of service than she has.

In ruling that United's seniority practice is therefore unlawful with respect to Mrs. Evans, the Seventh Circuit followed Title VII case law which had been previously established by numerous Courts of Appeals as well as this Court, and in many other decisions.

As the Seventh Circuit noted, this Court stated in *Griggs, supra*, 401 U.S. at 430:

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

In *Acha* v. *Beame*, 531 F.2d 648 (2d Cir., 1976), the Court of Appeals, in reversing dismissal of the complaint, held that a facially neutral, date-of-hire seniority system (like United's here) was discriminatory *as applied to plaintiffs* because it perpetuated the effects of past sex discrimination against them (there, a previous refusal to hire based on sex).[6] By relying on date-of-hire in computing seniority in the case of the identifiable victims of past hiring bias, the employer disadvantaged said plaintiffs as compared with males who were hired at the same time or later than plaintiffs would have been had the prior discrimination not occurred. Similarly, by relying on date-of-rehire and treating her prior illegal termination[7] as a break in service, United has disadvantaged Mrs. Evans as compared with males hired at the same time or later than she originally was, and males with less length of service than she actually has.

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[6] In that case, EEOC charges were filed well beyond the 706(e) limitation period with respect to the hiring discrimination but, as here, during the pendency of the seniority practice. There, as here, it was the seniority practice that was being attacked.

[7] This Court recognized in *Franks, supra*, 96 S.Ct. at 1266, that discriminatory hiring and discharges are "related 'twin' areas".

In fact, virtually every other Circuit Court of Appeals which has had an opportunity to rule on the issue, and whose ruling has either not reached or has been left undisturbed by this Court, has held, as did the Seventh Circuit, that if, as here, a current, facially neutral seniority or other employment practice perpetuates and locks in the effects of prior discrimination, then that current practice may be found unlawful under Title VII even if the policies which gave rise to the past discrimination are no longer in effect. *U.S.* v. *Bethelehem Steel Corp.*, 446 F.2d 652 (2d Cir., 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir., 1971), *cert. den.* 404 U.S. 1006 (1971); *Local 189, United Papermakers* v. *U.S.*, 416 F.2d 980 (5th Cir., 1969), *cert. den.* 397 U.S. 919 (1970); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 236 (5th Cir., 1973); *U.S.* v. *N.L. Industries*, 479 F.2d 354 (8th Cir., 1973); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir., 1970), *cert. den.* 401 U.S. 954 (1971). The EEOC has ruled the same way in a case virtually on all fours with *Evans*, *EEOC Dec. No. 71-413*, 3 FEP Cases 233 (1970). (This Court ruled in *Griggs, supra*, 401 U.S. at 434, that the Commission's interpretations of Title VII are entitled to great deference.)[8]

Moreover, the one pertinent major appellate case upon which this Court has ruled and which heretofore had provided possible contrary authority—*Jersey Central Power & Light Company* v. *International Brotherhood of Electrical Workers*, 508 F.2d 687 (3d Cir., 1975)—was vacated and remanded for further consideration in light of *Franks*.

[8] Among the many other cases in accord with this rationale are the closely analogous *Tippett*, *Healen*, *Burwell*, and *Jamerson* cases, *supra*, and *Payne* v. *Travenol Laboratories*, ... F.Supp. ....., 12 FEP Cases 770 (N.D.Miss., 1976). *See* also *Marquez* v. *Omaha District Sales Office*, 440 F.2d 1157 (8th Cir., 1971).

E.E.O.C. v. *Jersey Central Power & Light Co.*, ... U.S. ....., 96 S.Ct. 2196 (1976).[9]

United argues that the application of this widely accepted rationale to the case at bar "effectively eliminates the time limitation set forth in Section 706(d) [now 706(e)] of the Act." This alarmist position is unsound for several reasons.

First, the established principles for which *Evans* stands do not constitute an unfair trap for the innocent employer. Carolyn Evans has in fact filed a timely charge vis-à-vis the challenged employment practice. That seniority practice is no mere "effect"—it is an *active policy* which creates a current disparity. United itself opened the door to this litigation by explicitly relying on the present on its own past discrimination to penalize in a new way its own prior victim; United has no one to blame but itself. Under the circumstances, United is knowingly responsible for the relation between its present practice and its past discrimination.

Second, consistency and logic dictate that to deny the applicability of the rationale adhered to by the Seventh Circuit in this case would be to deny its applicability to the many cases set forth above, including rulings by the Second, Fourth, Fifth, Eighth and Tenth Circuits as well as this Court, and would throw heretofore settled employment discrimination law into a state of chaos. For United

[9] *Watkins* v. *United Steel Workers*, 516 F.2d 41, 44-45 (5th Cir., 1975) is distinguishable from the instant case in that there, unlike here, the plaintiffs challenging the seniority practice were not the *identifiable victims* of past discrimination, as the Court there made clear in its meticulously worded holding. This distinction was noted in *Payne*, *supra*, 12 FEP Cases at 784, and is significant in light of *Franks* and *Acha, supra*.

is not merely seeking to preserve a time limitations rule; that rule is not in issue. United is asking this Court to reject an established, substantive principle of Title VII law; it is asking this Court to declare that an employer may deny benefits to or otherwise injure an employee by applying to that employee a current facially neutral employment practice which creates a current disadvantage and disparity by giving present effect to prior discrimination against that employee by that employer. If that is so, the result would be disastrous. It would mean, in effect, that facially neutral employment practices— such as the invidious practices this Court struck down in *Griggs*— would no longer be attackable. Where a present policy is not facially neutral, it is of course attackable *per se;* but where, as in *Griggs,* the present policy *is* facially neutral, the attack must perforce be based upon the fact that the challenged practice prepetuates and locks in the effects of past discrimination. United seeks an end to such challenges and would thwart Congress' purpose in enacting Title VII.

Thus, United does not seek to prevent the opening of a new floodgate; rather, it seeks to close a well-traveled avenue of relief. Although they have recently been subjected to a great deal of publicity, there is no reason to believe that the cases in which, as here, a seniority practice is challenged as perpetuating the effects of prior discrimination would not continue to constitute a relatively small percentage of Title VII cases. And of those cases that do arise, established law has placed even further limits. First, under *Evans,* this Court's ruling in *Franks, supra,* and the *Acha* case, *supra,* only the identifiable victims of past discrimination would be entitled to relief; furthermore, as noted above, in 1972 Congress limited retroactive back pay relief to two years prior to the date of the

charge, and if further limitations are to be placed, Congress may do so.[10]

The doctrine necessarily applied by the Seventh Circuit in this case has historically been applied in situations, like this one, where the challenged action by the employer is a *seniority* practice; in such cases, the practice is characteristically of a continuing nature and is perforce tied to employment history and past actions affecting length-of-service. There need be no fear that the rationale which was once again correctly applied by the Court of Appeals here in a seniority context will be dramatically extended beyond its present scope. Were that to occur in some future case, the time for review by this Court would be then— not now.

Lastly, United suggests that it is not unreasonable to require Carolyn Evans to have taken timely steps at the time of her termination to protect her rights. The claim Mrs. Evans could have pressed in 1968 is not being "unbarred" here. For not challenging the 1968 termination at that time, Mrs. Evans, like the plaintiffs in the seniority cases cited above, has in fact already suffered an appropriate permanent and irretrievable loss of rights—chiefly, four years of back pay (1968-1972) which are concededly beyond the scope of this litigation. The seniority cases cited above involved past discrimination only because and to the extent that the employers there chose to actively perpetuate the past bias through their current practices. Similarly, this case involves the 1968 termination only

[10] The doctrine applied by the Seventh Circuit in this case was in existence before Congress amended Title VII in 1972; as noted in *Franks,* 96 S.Ct. 1264, n. 21, the absence of a contrary indication by Congress at that time reflects its assumption that this doctrine would continue to be applied.

because, and to the extent that, United has chosen to rely on that past discrimination and actively perpetuate in new form certain effects thereof through its current practices. Mrs. Evans seeks redress only for the injury and disadvantage she has suffered since her reinstatement due to the current seniority practice which she is challenging herein. Is it any less reasonable to require United to bear the responsibility for its present actions, whereby it openly uses its own past discrimination as an excuse to deny Mrs. Evans benefits today?

III

Collins And Evans Are Compatible— There Is No Conflict Among The Circuits

As Judge Cummings noted in dissenting to the Court of Appeals' first opinion (Petitioner's Appendix, p. A 12):

> "The alleged continuing discrimination in *Collins* was the failure to rehire plaintiff. Title VII, however, imposes no obligation on the employer to hire anyone *unless the refusal is motivated by discrimination.* There was no evidence in *Collins* that the decision not to rehire the plaintiff was based at all *upon the past act of discrimination.*" (Emphasis supplied.)

Unlike the case at bar, there was no allegation in *Collins, supra,* that United's refusal to rehire her was *based* at all upon her 1967 termination; rather, plaintiff in *Collins* in effect sought to have the Ninth Circuit declare that the failure to rehire was *per se* unlawful simply because her continuing non-employment to that point was attributable to the prior discrimination. *Collins* thus was truly challenging the mere passive *effects* of the prior termination and nothing more; no present act of United, either on or off the job, was actually *based* on that prior discrimination.

This is a crucial difference. United incorrectly states (Petition, p. 19) that the Court of Appeals confused the *effects* of an act of discrimination with the *act* of discrimination itself. Rather, in likening *Collins* to *Evans,* United has confused the mere passive effects of past discrimination (*Collins*) with a present act or practice, explicitly *based* on the past discrimination, which gives new on-the-job effect to the past discrimination, reactivates it in a new form, and results in present disparity and injury (*Evans*).

Plaintiff in *Collins* did not allege that United had refused to rehire her *because* she had once been terminated, or *because* United had a policy of not hiring former terminees and/or discriminatees, or *because* it did not wish to credit her with her prior service. (Had she done so, *Collins* would have been an entirely different case on its facts and would then have been closer to *Evans.*) Here, by contrast, it is uncontroverted that United refuses to credit Carolyn Evans with her prior service *precisely because* she had been terminated—which was an act of discrimination. Thus, the crucial distinction between the cases is that the challenged practice in *Collins* was not based on prior discrimination, whereas the challenged practice here is.

Viewed in this light, it is evident that the seeming anomaly suggested by United between the rights of former employees who are not rehired and former employees who are rehired simply does not exist. In both cases, one must look to the current practice being challenged, and determine whether that current practice is based upon prior discrimination. If, as in *Collins,* it is not so based, the plaintiff fails. If, as in *Evans,* the current practice *is* improperly based, the plaintiff succeeds. Thus, the cases

were rightly decided, and are logically and pragmatically consistent with each other.

Lastly, United's suggestion that *Evans* will discourage the rehire of former discriminatees is absurd. If anything, *Evans* would in fact have the opposite effect—for, as the point of distinction between *Collins* and *Evans* demonstrates, it may well be held *unlawful* for an employer to *base* a refusal to rehire a former employee on the fact that said employee was a former discriminatee. (No such allegation was made by plaintiff in *Collins*, of course.)

IV

The Court Of Appeals' Decision Is Entirely Consistent With This Court's Reasoning in Franks v. Bowman

United has taken the position that, since *Franks* was, strictly speaking, a remedy case and did not involve time limits, it was wrong for the Court of Appeals to take guidance from this Court's reasoning therein. United misconceives the application of *Franks* because of its misconception of the issue in *Evans*. Because the question here is not whether the charge was timely, but is, rather, *whether the challenged seniority practice is illegal*, the reasoning this Court followed in *Franks* bears directly on the issue at bar.

In order to show that the Court of Appeals' analysis was wrong, United has to establish that the challenged seniority practice, even though it creates a current disparity and perpetuates the effects of past discrimination, is not legally subject to Mrs. Evans' line of attack under Title VII. Since this case arises on a motion to dismiss and Mrs. Evans has advanced a clear theory of relief, there are two possible ways in which United could logically

have defended: (1) by using case law to demonstrate the lack of support for Mrs. Evans' legal theory and the inapplicability of the cases she adduces in her behalf, and/or (2) by seeking to rely upon a statutory protection, as the Court of Appeals recognized. United's defense has, instead, largely been one of avoidance. It has not questioned the applicability of the massive pertinent case law of at least five circuits. It has renounced reliance on Section 703(h) of the Act, and persists in adducing inapposite cases for the mutually agreed-upon proposition that, *if* Carolyn Evans were simply and solely attacking the 1968 termination, *then* her charge would have been untimely. What United fails to realize is that, in order for that argument to succeed, it has to show that its current seniority practice is immune from the attack being made upon it.

In light of the real issue presented by this case and as stated by the Court of Appeals in Part III of its final opinion, *Franks'* application herein is simple. Bowman had interposed the defense—albeit in a remedy case—that Section 703(h) immunized its seniority policy from attack, alteration, or interference under Title VII. In order to deal with that defense, this Court had to decide the nature of the substantive protection afforded by that section. It did so quite clearly:

> ". . . [I]t is apparent that the thrust of the section is directed towards defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring *prior to the effective date of the Act.*" (96 S.Ct. at 1263; emphasis supplied)

This being the case, it is readily apparent that if, as here, the operation of a seniority system is challenged as per-

petuating the effects of discrimination occurring *after* the 1965 effective date of the Act, then Section 703(h) of the Act does not apply and cannot "be used to interpose a legal bar to Evans' theory"—as the Court of Appeals correctly concluded. The fact that Congress made no changes in this Section in 1972 despite preexisting case law supportive of *Evans* is further reason to conclude that the Court of Appeals' disposition of this case comports with the legislative intent behind the Act. As this Court reconfirmed in *Franks*:

> ". . . Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin. . . ." (96 S.Ct. at 1263; emphasis supplied)

This Court said more in *Franks,* of course. It is apparent that an essential premise for the Court's conclusion, that retroactive seniority is an appropriate form of relief for the identifiable victims of past discrimination in hiring, is the realization—albeit in dicta——that without such relief, the effects of that past discrimination would be continually perpetuated by the employer's seniority policy, and a current and future disparity would exist, for the employee would

> ". . . perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors." (96 S.Ct. at 1266)

It was in the context of this dictum that the Court of Appeals examined the applicability to this case of the rationale which had been applied by the long line of cases set forth in Part II hereinabove, and so it found

that "[t]he teaching of *Franks* confirms these holdings" (Petitioner's Appendix, p. A 20).

Mrs. Evans does not seek to dismantle United's seniority *system*—she merely wishes the inequity produced by its application to her to be removed, so that she may assume her rightful place within that system. We note, too, that the concern addressed in the dissenting opinions of this Court in *Franks*—as to the effect on other employees of "competitive seniority" (as opposed to "benefit seniority") relief—is not presented by *Evans* at this time and is thus not ripe for review. In any event, of course, the practical ramifications of a single aspect of the relief sought should not in all fairness be allowed to affect the determination as to whether or not Mrs. Evans has alleged a substantive violation of the Act sufficient to withstand United's motion to dismiss.

Conclusion

Denial of United's Petition would be an exercise of sound judicial discretion.

The Court of Appeals correctly applied settled and consistent legal principles—firmly grounded in the decisions of this Court, and numerous Courts of Appeals—and thereby reached a sound and logical result. United has demonstrated neither the legal insufficiency of Mrs. Evans' claim nor the inapplicability of her theory of relief to the facts alleged in the complaint.

The *Evans* decision opens no new loophole in the time limits set forth in the Act. It is compatible with *Collins,* and so presents no conflict among the Circuits. *Evans* is no mere "effects" case—this lawsuit challenges a quite

real ongoing employment practice which, in its application to Mrs. Evans, is based upon and gives present effect to past discrimination. The decision will not discourage employers from rehiring former discriminatees; if anything, it may well have the opposite effect and help fulfill the "make whole" purpose of Title VII.

The Court of Appeals' decision is entirely consistent with both the letter and the spirit of this Court's reasoning in *Franks* and does not conflict with that case—or any other decision of this Court—in any way. No departure from settled law, logical reasoning, or the usual course of judicial proceedings, has occurred so as to call for an exercise of this Court's power of supervision. The *Evans* decision raises no new important question of federal law which requires settling by this Court; it rests squarely and finally upon established precedent.

However, if this Court were to disturb *Evans,* the established principles for which it stands would be undermined; a prior landmark decision of this Court would be drawn into question, as would heretofore accepted rulings of other federal courts; and the law would be thrown into a state of chaos by what would necessarily be a confusing and far-reaching retrenchment. Review of this case would be especially inopportune now, at a time when this Court has, through *Franks* and the *Jersey Central* remand, already provided adequate guidance for the future.

Lastly, and in any event, this case is not ripe for review by this Court, because the decision of the Court of Appeals, which results simply in the denial of a motion to dismiss the Complaint, is not a final result.

For the foregoing reasons, and in the absence of any countervailing consideration within the reasonable purview of Rule 19 of this Court, Carolyn Evans respectfully urges that United's Petition be denied.

Respectfully submitted,

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Counsel for Respondent

Dated: October 6, 1976

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAROLYN J. EVANS,

Plaintiff,

v.

UNITED AIR LINES, INC.,

Defendant.

No. 74 C 2530

COMPLAINT

Plaintiff complains of defendant as follows:

I. This is a suit for injunctive and other relief authorized by and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* The jurisdiction of the Court is invoked to secure protection of and to redress deprivation of rights secured by 42 U.S.C. §2000e-2, making it illegal to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex.

II. Defendant United Air Lines, Inc. (hereinafter referred to as United) is a corporation doing business throughout the United States, with a major place of business in the Northern District of Illinois. Plaintiff Carolyn J. Evans is a stewardess employed by United, and is a resident within the Northern District of Illinois. The unlawful employment practices alleged herein were committed within the territorial jurisdiction of this Court as provided in 42 U.S.C. §2000e-5(f). Defendant employs more than twenty-five (25) persons and is engaged in an enterprise affecting commerce within the meaning of 42 U.S.C. §2000e.

III. Plaintiff filed charges with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) on February 21, 1973, charging that defendant United discriminated and continues to discriminate against plaintiff on the basis of sex (female). Plaintiff complained of and does complain of the fact that United maintained a policy and practice of terminating females, but not males, from their flight personnel (stewardess) positions upon marriage or contemplation of marriage; that plaintiff was forced to resign her position as a stewardess pursuant to this policy; that United refused to reinstate plaintiff; and that, when United did later rehire plaintiff, it refused and continues to refuse to credit plaintiff with all her former seniority. On August 29, 1974, plaintiff was granted the right to sue in United States District Court by the EEOC pursuant to 42 U.S.C. §2000e-5(f). A copy of the letter granting plaintiff the right to sue is attached hereto as Exhibit A. This suit has been filed within the required 90-day period prescribed in 42 U.S.C. §2000e-5(f).

IV. Plaintiff Evans began employment as a stewardess for defendant United in November, 1966, and completed stewardess training on December 28, 1966. Plaintiff was subsequently forced by defendant United to submit her resignation from her position as stewardess pursuant to United's policy and practice of terminating females, but not males, from their flight personnel positions upon marriage or contemplation of marriage. Plaintiff's employment by United was effectively terminated in February, 1968, pursuant to aforesaid forced resignation in accordance with said policy and practice.

V. On numerous subsequent occasions, plaintiff sought reinstatement as a stewardess with defendant United and was refused such reinstatement by defendant. In November, 1971, plaintiff again sought such reinstatement, and was effectively re-employed as a stewardess by United on February 16, 1972. Following one month of training completed on March 16, 1972, plaintiff has continued as a stewardess in the employ of United to this date.

VI. Plaintiff has been credited by defendant with "Company" (or "pay") seniority as of February 16, 1972, and with "stewardess" (or "system") seniority as of March 16, 1972. Among other effects, either or both types of seniority directly or indirectly determine a stewardess' wages, amount of minimum monthly compensation, amount of entitlement to furlough pay, amount of compensation for and duration and timing of vacation periods, rights to retention in case of furlough due to reduction in force, rights to re-employment after furlough, and rights to preference in assignment as to geographical location and type of aircraft.

VII. On November 7, 1968, defendant United and the Air Line Pilots Association, International (hereinafter referred to as Association), which was and is at all times relevant herein the exclusive collective bargaining agent of all stewardesses employed by United, concluded a "letter of agreement" whereby marriage would no longer disqualify a stewardess from continuing in the employ of United as a stewardess, and whereby stewardesses who had been terminated by reason of United's no-marriage policy would be offered reinstatement with no loss of seniority if they qualified under certain express conditions. A copy of this "letter of agreement" is attached hereto as Exhibit B, and is incorporated by reference as if set forth at length herein. As therein provided, plaintiff was excluded from the class of those eligible for reinstatement as active stewardesses with United.

VIII. On October 16, 1969, defendant United and said Association concluded a second "letter of agreement", a copy of which is attached hereto as Exhibit C, and is incorporated by reference as if set forth at length herein. As therein provided, plaintiiff was excluded from the class of those eligible for reinstatement as active stewardesses with United.

IX. On October 16, 1972, plaintiff filed a grievance against defendant United protesting United's continuing failure to credit her with all former seniority. This grievance has been denied by United.

X. Defendant United has failed and refused and continues to refuse to credit plaintiff Evans with all former seniority earned by plaintiff from the date of her initial employment in November, 1966, and the date of her initial graduation from stewardess training on December 28, 1966, as well as continuous seniority from those dates, and has thereby caused caused plaintiff to suffer loss of wages and other benefits. This is a continuing violation of 42 U.S.C. §2000e-2, resulting from: (1) defendant United's wrongful conduct in implementation of its no-marriage rule, thereby forcing plaintiff Evans to be termiated as a stewardess in February, 1968, which conduct constituted discrimination on the basis of sex in violation of 42 U.S.C. §2000e-2; (2) defendant United's wrongful exclusion of plaintiff from the reinstatement opportunity provided to others in the two letters of agreement (referred to in paragraphs VII and VIII herein) executed with Association, which served to perpetuate and continue United's discriminatory policy as applied to plaintiff in violation of 42 U.S.C. §2000e-2; (3) defendant United's continued failure to provide for and offer plaintiff reinstatement as a stewardess until November, 1971, which failure constituted discrimination based upon sex in perpetuation of the effects of prior discrimination in violation of 42 U.S.C. §2000e-2; and (4) defendant United's continuing implementation of and failure to remove from plaintiff the continuing and presently operative effects of its discriminatory practices and policies, which failure constitutes continuing discrimination based upon sex in violation of 42 U.S.C. §2000e-2. As a result of defendant United's continuing discrimination against plaintiff because of her sex, plaintiff has been and continues to be deprived of her rightful seniority, wages, and other benefits of employment, in violation of 42 U.S.C. §2000e-2.

Wherefore, plaintiff demands judgment against defendant United Air Lines, and prays for the following relief:

1. An order permanently enjoining defendant United from engaging in any discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*;

2. An order requiring defendant United to restore to plaintiff and credit plaintiff with all seniority back to the starting date of her initial employment with United, including credit for any period of time, since such date, during which plaintiff was separated from United by reason of the discriminatory conduct of United, as well as credit for all such seniority actually earned;

3. An order requiring defendant United to compensate plaintiff for all amounts of back pay and other benefits of employment lost as a result of the discriminatory employment practices of said defendant;

4. An order requiring defendant United to pay to plaintiff exemplary damages in the amount of One Hundred Thousand ($100,000) Dollars;

5. An order requiring defendant to pay the cost of this suit;

6. An order requiring defendant to pay reasonable attorney's fees;

7. Any and all other relief as the Court deems proper, equitable and just.

Dated: September 4, 1974

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SECTION 703(h) OF THE CIVIL RIGHTS ACT OF 1964 [42 U.S.C. §2000e-2(h)]

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29.

SECTION 706(e) OF THE CIVIL RIGHTS ACT OF 1964 [42 U.S.C. §2000e-5(e)]

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person

aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

SECTION 706(g) OF THE CIVIL RIGHTS ACT OF 1964 [42 U.S.C. §2000e-5(g)]

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 2000e-3(a) of this title.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

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SUBJECT INDEX.

TABLE OF AUTHORITIES.

Cases.

Statutes.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

On November 1, 1976, this Court granted the Petition of United Air Lines, Inc. (hereinafter "United") for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the captioned case. This is the brief for United.

OPINIONS BELOW.

The Memorandum Opinion of the District Court for the Northern District of Illinois dated April 9, 1975 is officially unreported. A copy appears in the Appendix at page 17. The first opinion of the Court of Appeals dated January 29, 1976 is officially unreported. A copy appears in the Appendix at page 21. The opinion of the Court of Appeals after rehearing is reported at 534 F. 2d 1247 (7th Cir. 1976). A copy appears in the Appendix at page 33.

JURISDICTION.

The final judgment of the Court of Appeals after rehearing was entered on April 26, 1976. United's petition for rehearing with suggestion for rehearing *en banc* was denied June 7, 1976 (A. 41). Jurisdiction is conferred on this Court by 28 U. S. C. Section 1254(1).

STATUTE INVOLVED.

The Civil Rights Act of 1964 (hereinafter, the "Act"), 42 U. S. C. § 2000e, *et seq.*, specifically, Section 706(d) thereof (42 U. S. C. § 2000e-5(d)) as it existed prior to the 1972 amendments is the statute involved.[1] In 1972, Section 706(d) was relettered Section 706(e) and is currently in effect as such. The original wording of Section 706(d) and the wording of this Section as relettered in 1972 appear below.

> **Sec. 706(d).** [42 U. S. C. § 2000e-5(d)]. A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. [Sec. 706(d) prior to March 24, 1972.]
>
> **Sec. 706(e).** [42 U. S. C. § 2000e-5(e)]. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. [Sec. 706(d) as relettered Sec. 706(e) effective March 24, 1972 and as currently in effect.]

1. Public Law 92-261 amended the Act effective March 24, 1972. Evans' resignation and rehire both occurred before the 1972 amendments became effective.

QUESTIONS PRESENTED FOR REVIEW.

Does the reemployment of a former employee with new date-of-hire seniority under a neutral seniority system permit the resurrection of that employee's time-barred claim for loss of seniority and pay arising from termination of that employee's prior employment?

Are the collateral or lingering *effects* of a prior act of discrimination *in themselves* acts of discrimination against an employee, permitting the filing of a charge at any time in the future regardless of how long ago the prior act of discrimination occurred?

STATEMENT OF THE CASE.

This is an action brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, *et seq.*, by Carolyn J. Evans (hereinafter "Evans"), a former and subsequently rehired stewardess with United, to recover seniority and back pay lost as a result of her separation from employment as a stewardess in February of 1968 (A. 4). Jurisdiction was based on Section 706(f), 42 U. S. C. § 2000(e)-5(f), of the Act.

Evans was first hired by United as a stewardess in November, 1966 and continued that employment relationship until February, 1968, when she involuntarily resigned in anticipation of her marriage and pursuant to United's then existing "no-marriage" rule that applied to stewardesses (A. 5).[2] As a result of her resignation, all aspects of her employment relationship with United terminated, including seniority, pay, vacations, travel passes, etc. Evans did not protest her involuntary resignation or the loss of these employment benefits by filing a charge with the Equal Employment Opportunity Commission ("EEOC") or any state agency within ninety days of her separation or at any time during the next four years.

On February 16, 1972, Evans made application and was accepted for employment by United as a new stewardess (A. 5). She was sent to the same training school as other new hires and was graduated March 16, 1972 (A. 5). She commenced work as a new stewardess with a seniority date reflecting her date of hire in 1972, the same as other new hires with whom she graduated (A. 5). In all respects, Evans was treated as a new hire and granted the same benefits and conditions of employment as other new hires.

On February 21, 1973, five years after her resignation in 1968 and approximately one year after her rehire as a new stewardess, Evans—for the first time—filed a charge of discrimination under Title VII complaining, in substance, that United unlawfully terminated her in February, 1968 and currently refused to restore the seniority she lost when her resignation was accepted in 1968 (A. 4-5). On August 29, 1974, the EEOC issued Evans a "right to sue" letter and, on September 4, 1974, Evans filed her complaint in the United States District Court for the Northern District of Illinois, Eastern Division (A. 5).

2. This policy of requiring stewardesses to remain unmarried was discontinued by United on November 7, 1968. On the same date, United, by letter agreement with the collective bargaining agent for its stewardesses, agreed to reinstate those stewardesses, upon timely application, who had been terminated under the no-marriage rule and who had filed a grievance under the collective bargaining agreement or a charge of discrimination with the Equal Employment Opportunity Commission or an applicable state agency. Evans had filed no such protest concerning her separation from employment although it had occurred eight months before and, therefore, she did not qualify for reinstatement under the letter agreement of November 7, 1968.

In her complaint, Evans alleged that she had been discriminated against on the basis of sex when United, by reason of its no-marriage rule, forced her to resign her employment as a stewardess in 1968 (A. 7). To avoid the application of any time limitations for her failure to file any previous charge of discrimination, Evans asserted the existence of an alleged continuing violation in that the failure to credit her with her former seniority, now that she was back in an employment relationship, currently discriminated against her on the basis of sex by depriving her of the higher wages and benefits she would have had if that seniority had been credited to her (A. 7).

United took the position that the act of discrimination which caused her original 1966 seniority to cease was her forced resignation in 1968 pursuant to the then-existing no-marriage rule. It was this action in 1968 that terminated her employment with United and terminated all benefits, including seniority, associated with that employment. United maintained that this was a completed and final act for which a timely charge of discrimination could have been filed. United pointed out that there was a four year period in which there was no employment relationship between Evans and United. The fact that Evans was subsequently hired as a new employee and given a new seniority date in 1972 under an admittedly neutral date-of-hire seniority system did not alter the fact that her former seniority had been lost when her former employment was terminated in 1968. United moved to dismiss the complaint on the ground that timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to filing of a civil action under Title VII and that Evans' claim for restoration of the seniority she lost in February, 1968 was untimely in that any charge relating

to that loss should have been filed within ninety days of that event, not five years later (A. 15).

The District Court granted United's motion to dismiss (A. 16). By memorandum opinion entered April 9, 1975, the District Court concluded that "Evans . . . has not been suffering from any 'continuing' violation. She is seeking to have this court merely reinstate her November, 1966 seniority date which she lost solely by reason of her February, 1968 resignation" and that "United's subsequent employment of plaintiff in 1972 cannot operate to resuscitate such a time-barred claim" (A. 17-18).

On appeal to the Court of Appeals, Evans took the position that the District Court erred in dismissing her Complaint since the violation complained about was allegedly a "current and continuing" violation of the Act; *i.e.*, Evans was presently holding a seniority position as a stewardess inferior to the seniority position she would have had if her 1966-68 seniority had been credited to her on rehire. In short, Evans continued to argue that the Company's action in requiring her to resign in 1968 was an unlawful act of discrimination and that United was and is unlawfully perpetuating the effects of that past discrimination and actively enabling that prior discrimination to reach effectively into the present.

United's position before the Court of Appeals remained the same; *i.e.*, the actionable injury to Evans under the Act was her termination from employment in February, 1968, at which time she lost her seniority and all other benefits associated with that employment. Since her complaint concerned that loss of seniority, it was from the date of that loss that the time limit for filing a charge began to run—but that time limit had long since passed.

On January 29, 1976, the Court of Appeals, in a divided opinion, affirmed the District Court's dismissal of the Complaint (A. 20). The majority of the Court concluded that United's seniority policy is not discriminatory in itself with respect to sex and that such a policy, which is neutral, cannot be said to

perpetuate past discrimination, long since discontinued, in the sense required to constitute a "current" violation of Title VII. The majority of the Court stated (A. 27-28):

> ". . . If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termination alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period."

The dissenting judge disagreed, stating that he believed "continuing discrimination" to be present since failure to credit Evans with back seniority as a current employee gives "collateral effect" to the past act of discrimination (A. 29).

On February 12, 1976, Evans petitioned the Court for a rehearing. The EEOC shortly thereafter filed a brief as *amicus curiae* in support of that petition. While the petition was pending, this Court issued its decision in the case of *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 96 S. Ct. 1251 (March 24, 1976). Evans filed a supplemental brief instanter on March 30, 1976 asserting that the *Franks* decision was of controlling guidance in support of her position. On April 6, 1976, the Court of Appeals granted Evans' motion for rehearing (A. 31) and on April 26, 1976 reversed its February 12 decision (A. 32). Its reversal was based upon its interpretation of the *Franks* decision (A. 39).

United petitioned the Court for rehearing with a suggestion for rehearing *en banc* on May 10, 1976. That petition was rejected on June 7, 1976 (A. 41). United then filed a Petition for a Writ of Certiorari, which this Court granted on November 1, 1976.

SUMMARY OF ARGUMENT.

Section 706(d) of the Act stated that charges of discrimination under the Act must be filed within ninety days of the alleged unlawful employment practice.[3] It is settled law that such timely

3. Illinois law did not cover sex discrimination in 1968; hence the ninety day provision is the applicable provision.

filing constitutes a jurisdictional prerequisite to institution of a lawsuit.

In this case Evans is claiming that the seniority she accrued prior to her involuntary resignation in February, 1968, should have been added to the seniority she began to accrue in February, 1972 when she was rehired as a new employee. The loss of such former seniority, however, occurred in 1968 as a direct consequence of her resignation and any claim to such seniority was lost when she failed to file a charge within ninety days of that event.

The resignation of Evans in February, 1968 constituted a final act—a complete severance of the employment relationship in every respect—and cannot properly be construed as a "continuing violation." Prior court decisions have so held. Although there are "lingering effects" of the resignation in 1968, these "effects" do not in and of themselves constitute new acts of discrimination within the meaning of the Act for, if they were so construed, the time limits in the Act would become meaningless since every act of discrimination has some lingering effects.

The decision of the Court of Appeals after rehearing creates a conflict in the Circuits inasmuch as other Courts of Appeal have rejected the argument that the lingering effects of termination of employment are themselves acts of discrimination.

Further, the decision was based upon an erroneous interpretation of this Court's decision in the *Franks* case, *supra*. In *Franks*, this Court held that Section 703(h) of the Act as applied to a bona fide seniority system did not preclude *as a matter of remedy* the grant of retroactive seniority in a situation in which the timely filing of the original charge of discrimination was not in issue and the court had jurisdiction over the matter. The decision in *Evans*, however, is authority for a different proposition; *viz* that a claim of discrimination is timely as long as some "collateral effects" of a time-barred act of discrimination are not rectified when a rehired employee is assigned a seniority date reflecting her new date of hire in a neutral, bona

fide, seniority system. The mere fact of rehire and the routine operation of a completely neutral date-of-hire seniority system are, therefore, permitted to convert a barred claim of discrimination into a current continuing violation permitting the filing of a charge at any time—a result clearly never contemplated by this Court in *Franks*.

ARGUMENT.

I.

The Time Limit of Section 706(d).

Section 706(d) of the Act is clear and unambiguous. Prior to the 1972 amendments of the Act, Section 706(d) provided that charges of discrimination in a state which did not have a law banning such discrimination must be filed within ninety days of the act of discrimination. As stated in Section 706(d):

> "A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred. . . ."

The only change made by the 1972 amendments to the quoted language was to enlarge the ninety day period to 180 days.

It is settled law that fulfillment of the above requirement is a jurisdictional prerequisite to the filing of a lawsuit. The Court of Appeals for the Seventh Circuit recognized this in the case of *Choate* v. *Caterpillar Tractor Company*, 402 F. 2d 357, 359 (7th Cir., 1968) wherein the court stated:

> "The requirement that a complainant must invoke the administrative process within the time limitations set forth in Section 706(d) is a jurisdictional precondition to the commencement of a court action."

This Court, in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), agreed when it stated, in the language of Mr. Justice Powell, at p. 47, that the Act:

> ". . . specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were

met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue 42 U.S.C. §§ 2000e-5(b), (e) and (f)".

To the same effect is *McDonnell Douglas Corp.* v. *Greene,* 411 U. S. 792, 798 (1973).

Other Circuits are in accord that the time limits in Title VII must be complied with to confer jurisdiction; see, *e.g., Griffin* v. *Pacific Maritime Assoc.,* 478 F. 2d 1118 (9th Cir., 1973), *cert. denied,* 414 U. S. 859; *East* v. *Romine, Inc.,* 518 F. 2d 332, 336 (5th Cir., 1975); *Olson* v. *Rembrandt Printing Co.,* 511 F. 2d 1228, 1231 (8th Cir., *en banc* 1975); *Revere* v. *Tidewater Tel. Co.,* 485 F. 2d 684 (4th Cir., 1973) and *Greene* v. *Carter Carburetor Co.,* 532 F. 2d 125 (8th Cir., 1976). Also, *Younger* v. *Glamorgan Pipe & Foundry Co.,* 310 F. Supp. 195 (W. D., Va., 1969) and *Gordon* v. *Baker Protective Services, Inc.,* 358 F. Supp. 867 (N. D., Ill., 1973).

II.

The Act of Discrimination in This Case Occurred in February, 1968.

United's seniority system, as it pertains to United's stewardesses as well as other employees, is a commonly used system whereby employees begin to accrue seniority when they commence work and lose seniority when employment is terminated. Seniority rights, along with other perquisites of employment such as wages and fringe benefits, are derived from the employment relationship and apply only as long as there exists an employment relationship.

When Evans was first employed by United in November, 1966, she began to accrue seniority and by the time of her resignation in February, 1968, had accrued approximately 16 months' seniority. When she resigned in February, 1968, her seniority terminated, as did all other perquisites of the em-

ployment relationship. She then became a member of the general public and stood on the same footing as other members of the general public, with the sole exception that she possessed a right, for ninety days, to file a charge with the EEOC protesting her involuntary resignation and the accompanying loss of her seniority, wages, travel passes, etc. At the expiration of ninety days, she possessed no rights whatsoever to challenge the loss of that seniority or other employment benefits.

Before her employment by United as a "new" stewardess in February, 1972, Evans concededly had no right of reinstatement to her former employment nor to any benefits attached thereto. Similarly, upon her new employment, she had no claim or rights arising out of her former period of employment since any claim to such rights had long expired. It was not until approximately one year after she was reemployed in 1972 that Evans first claimed that the seniority she accrued between November, 1966 and February, 1968, should have been added to her new seniority in 1972. According to Evans, although she admittedly had no right in February, 1972 to be reinstated to her former employment, once she resumed an employment relationship, the failure of United thereafter to add her former seniority created a new and continuing violation pursuant to which a charge could be filed at any time.

It is evident, however, that the actual act of discrimination of which Evans complains occurred in February, 1968, for that is the time she lost the 16 months' seniority which she claims. As a new employee in 1972, she could justify no more right to 16 months' added seniority than any other new hire. The only basis on which she claims such added seniority arises from her prior period of employment—but all claims arising from that period of employment were barred ninety days after her resignation in 1968. Once barred, they could not be resurrected. Yet, this is what the Court of Appeals erroneously permitted in this case—and solely because of United's action in reemploying her.

III.

Evans' Termination of Employment in 1968 Constituted a Final Act and No "Continuing Violation" Is Involved in This Case.

Virtually every court that has had occasion to pass on the question has held that a termination of employment is a "final act" and not a continuing violation.[4] As aptly stated in *Phillips* v. *Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 537-8 (D.C. W. Va. 1972), *affirmed without opinion* 474 F. 2d 1342 (4th Cir., 1973):

> "It is clear that the unlawful discriminatory practice complained of by plaintiff arises out of the termination of his employment on September 25, 1969. Although plaintiff has alleged a continuing practice of discrimination in his complaint, the record before this court, aside from plaintiff's pleadings, establishes only this single act which could arguably be considered an unlawful employment practice. Plaintiff attempts to avoid the limitation period set forth in Section 706(d) by asserting that the discriminatory practice continued until July 7, 1970, when a negro was hired as his replacement. The record establishes, however, only a single act, occurring on September 25, 1969, which conceivably could form the basis of a charge under the Civil Rights Act of 1964. To hold that the alleged discriminatory termination of plaintiff's employment constituted a continuing practice of discrimination would be to negate reality. * * *"

4. In addition to cases under the Civil Rights Act referred to in footnote 5, *infra*, it has also been consistently held in cases arising under the National Labor Relations Act that a termination of employment is a final act, and where the time limit for filing a charge of unfair labor practice has not been met, a complaint based upon that termination is time-barred. To permit the "effects" to be used as a basis for a subsequent complaint would result in reviving a legally defunct claim. *NLRB* v. *Textile Machine Works*, 214 F. 2d 929 (3rd Cir. 1954); *NLRB* v. *Childs Co.*, 195 F. 2d 617 (2nd Cir. 1952); *NLRB* v. *Pennwoven, Inc.*, 194 F. 2d 521 (3rd Cir. 1952).

In *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1234 (8th Cir., 1975), the Court of Appeals for the Eighth Circuit stated that:

> ". . . Termination of employment either through discharge or resignation is not a 'continuing' violation. . . ."

This Court, in *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 95 S. Ct. 1716 (1975), recently recognized that time limits for protesting discharges are counted from the date of discharge. In *Johnson*, the petitioner was discharged on June 20, 1967. Some three and one-half years later, petitioner brought court action under the Civil Rights Act of 1866, 42 U. S. C. § 1981, alleging that he was discriminated against on the basis of his race when discharged. Since the action took place in the State of Tennessee, a one year statute of limitation was applicable to actions brought under 42 U. S. C. § 1981. Rejecting the argument that petitioner's failure to file his suit within the one year limit was excused because he had filed a timely charge under Section 706 of the Civil Rights Act of 1964, this Court stated, 421 U. S. 462-3:

> "The cause of action asserted by petitioner accrued, if at all, *not later than June 20, 1967, the date of his discharge*. Therefore, in the absence of some circumstance that suspended the running of the limitation period, petitioner's cause of action under § 1981 was *time-barred* after June 20, 1968, over two and one-half years before petitioner filed his complaint." (Emphasis added.)

Significantly, this Court did not hold that petitioner's charge was timely because he "continued" to suffer the effects of his discharge. It was the act of discharge on June 20, 1967 which began the running of the applicable time limit and petitioner's claim was time-barred as a result of his failure to meet that limitation.[5]

5. See also *Revere* v. *Tidewater Telephone Co.*, 485 F. 2d 684 (4th Cir., 1973) affirming the District Court's denial of jurisdiction for failure of a discharged employee to file his charge with the EEOC within ninety days; *Buckingham* v. *United Air Lines, Inc.*,

(Continued on next page)

In *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806, 808 (7th Cir. 1975) the Court of Appeals stated:

> ". . . If they [plaintiffs] believed that their termination was the result of unlawful discriminatory practices, then a charge was required to be filed within ninety days of that termination. Although the plaintiffs contend that the ninety-day limitation period is no bar because the discrimination is continuous in nature, this is not the case once employment has ended. * * *
>
> . . . For such a former employee the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date. . . ."

In *Collins* v. *United Air Lines, Inc.*, 514 F. 2d 594 (9th Cir., 1975), the Court of Appeals for the Ninth Circuit ruled in a case involving another United stewardess who resigned because of the same "no-marriage" rule, that her lawsuit was barred because of her failure to file charges with the EEOC within ninety days of her resignation.

Except for the fact that Evans was employed as a new stewardess several years after her original employment ended whereas Collins was not, the fact situations in the two cases are almost identical. Both plaintiffs were stewardesses hired by United prior to 1968. Both resigned involuntarily because of United's no-marriage rule—Collins in 1967 and Evans in 1968. Neither filed a charge protesting her termination within ninety days following the termination. In Collins' case, she first filed her charge in 1971, some four years after her termination. In

(Continued from preceding page)

..... F. Supp. ....., 11 FEP Cases 344, 349 (C. D. Cal. 1975); *Higginbottom* v. *Home Centers, Inc.*, ... F. Supp. ....., 10 FEP Cases 1258, 1260 (N. D. Ohio, 1975); *Doski* v. *M. Goldseher Co.*, ... F. Supp. ....., 11 FEP Cases 468, 470 (D. Md. 1975); *Guy* v. *Robbins & Myers, Inc.*, 525 F. 2d 124 (6th Cir. 1975), *cert. granted* 44 U. S. L. W. 3608 (April 27, 1976) and, in particular, *Kennedy* v. *Braniff Airways, Inc.*, 403 F. Supp. 707 (N. D. Tex. 1975) and *Turnow* v. *Eastern Airlines*, ... F. Supp. ....., 13 FEP Cases 1227 (D. N. J. 1976), cases strikingly similar to *Evans*.

Evans' case, she first filed her charge in 1973, five years after her termination. Both Evans and Collins contended their charges were timely filed because the alleged violations were "continuing" in that United had continually denied to them privileges and benefits of employment, including prior employment seniority.

The Court of Appeals in *Collins* ruled that her charge was untimely filed since she did not file it within ninety days of her resignation. The Court of Appeals in *Evans* ruled that Evans' charge was timely even though she failed to file it within ninety days of her resignation. Answering the contention that the violation was "continuing", the Court in *Collins* said (514 F. 2d at 596):

> "We cannot accept Collins' argument that her continuing nonemployment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, it is the alleged unlawful act or practice—not merely its effects—which must have occurred within the 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period.

The argument that the *effects* of a past act of discrimination rather than the act of discrimination itself constitutes a new or continuing violation of Title VII, as rejected in *Collins, supra*, was similarly rejected in a very recent decision of the U. S. District Court for the Southern District of New York rendered after this Court's decision in *Franks* v. *Bowman Transportation Co., supra. In Cates* v. *Trans World Airlines*, ... F. Supp. ....., 13 FEP Cases 201 (S. D. N. Y., July 22, 1976), a pilot employee claimed that he would have had higher seniority benefits and standing but for the fact that his employer had a previous discriminatory policy against hiring black pilots. In 1972, some six years after his employment took place in 1966, he filed a charge with the EEOC for the first time contending, as does Evans here, that he was suffering the current effects of a prior act of discrimination. Specifically, he contended that the

failure of TWA to hire him earlier caused him to occupy a lower seniority status and to have fewer benefits than he would have had if hired prior to 1966. The Court rejected the argument that the presence of the continuing "effects" constituted new and separate events of discrimination for which a new charge of discrimination could be timely filed. As stated by the Court (13 FEP Cases at 209):

> ". . . While Whitehead had not alleged that he was denied some benefit traceable to his low seniority status within 180 days of the filing of charges with the EEOC, the Court will construe his complaint so as to make such an allegation. Still, this does not help him state a timely claim for relief. The monthly allocation of seniority benefits pursuant to a facially neutral, date-of-hire seniority system is not the event by which an unlawful employment practice occurs for the purposes of triggering the 180 day limitations period in which to file charges. Any detriments which he may have suffered during this period are not in and of themselves fresh acts of discrimination, but are only the derivative effects of the prior policies as carried forward by the seniority system. As a case like Collins makes clear, it is the unlawful *act* or *practice* and not merely its effects which must occur within the 180 day period prior to the filing of charges with the EEOC."

IV.

The Fact That Evans Was Rehired Does Not Resurrect Her Time-Barred Claim—Franks v. Bowman Is Inapposite.

In its initial decision, the Court of Appeals in *Evans* recognized that Evans had been rehired by United before she filed her charge with the EEOC but held that nonetheless her claim was barred by time limits because she had not filed it within the time specified in the Act. As correctly stated by the Court in its initial decision (A. 27-28):

> ". . . If there is no continuing discriminatory practice with respect to Evans, her only basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968. A suit based on that termination alone, however, would be barred for failure to file a charge relating to the termination within the statutorily required period."

The cases discussed above in this brief, including *Collins, supra* and *Terry, supra,* establish that a termination is a final act and is not a continuing violation of the Act. Therefore, as the Court of Appeals correctly held in its initial decision, any claim she had "relating to the termination" would be barred.

After the Court of Appeals received and interpreted this Court's decision in *Franks* v. *Bowman Transportation Co., supra,* it reversed its ruling. In its second and final decision in *Evans,* the Court's reliance on *Franks* was made clear. The Court said (534 F. 2d at 1250):

> "It is in the context of the *Franks* decision that we must consider whether Evans' complaint was filed within 90 days of a violation of Title VII, thus affording jurisdiction to the district court. More specifically, the issue is whether . . . [Sec. 706(h)] may be used to interpose a legal bar to Evans' theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuous violation of her Title VII rights.[6]

The Court of Appeals construed *Franks* as requiring the finding that operation of a neutral date-of-hire seniority policy to a rehired employee necessarily constitutes a current or continuing violation of the Act if the effects of some prior act of discrimination, a charge as to which act in itself has been time-barred, are carried forward. In so reading *Franks,* the Court of Appeals was in error.

Franks has no application to the real question at issue in the present case. *Franks* simply stands for the proposition that a federal court has power to *remedy* an act of discrimination by

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6. United never raised the defense that Section 706(h) barred Evans' claim. It had no need to do so since Section 706(d), correctly interpreted, provided a complete defense. The Court of Appeals inserted the Section 706(h) argument as an issue, then decided that issue against United.

an award of retroactive seniority to the victim of discrimination *in a situation in which the time limits for filing the complaint are met and the court has jurisdiction. Franks* does not stand for the proposition that a federal court has jurisdiction over claims *in which the time limits of the Act were not met.* In *Franks,* retroactive seniority was authorized for members of a class in which the named plaintiffs had filed a timely charge. In *Evans,* no timely charge was filed. Thus, the District Court in *Evans* did not have jurisdiction over her claim to seniority arising out of her 1966-68 employment. *Franks* is inapposite.

As applied to Evans herself, it is not unreasonable to require that she should have taken timely steps at the time of her termination to protect her rights. It was at that point, in actually losing her job and seniority, that the "act" of discrimination occurred—the date the no-marriage rule was applied to her. It was at that point at which it could reasonably be expected that she would have sought remedial action if she felt she had been treated unfairly. Moreover, despite the discontinuance of the no-marriage rule by United in November, 1968 and despite her employment as a new hire with new date-of-hire seniority in February, 1972, Evans still failed to file her charge until over one year later. With ample opportunity to file a claim—with over five years passing since her termination and the loss of her former seniority—and *with no ongoing pattern and practice of discrimination,* it is unreasonable to so loosely construe the "continuing discrimination" concept as to permit Evans to resurrect those claims that were clearly time-barred.

If the Court of Appeals' broad extension of the "continuing discrimination" concept in *Evans* were to receive acceptance, then *any* present employee who was discriminated against in the past could wait indefinitely and file a charge any time in the future—whether five, ten, fifteen or more years later, for he would meet the criteria of *Evans* of being an employee who could be in the position of always suffering the effects of a past action of discrimination. The time limits specified in Section 706 of the Act would be meaningless.

To illustrate: Assume that an employee was discriminatorily laid-off in 1970 and remained in such status for three years. She returns to active employment in 1973 and remains an employee for thirty years thereafter and, at the end of thirty years, first files a charge of discrimination with the EEOC. (Evans waited one year after her return to employment.) She claims a continuing adverse effect on her pay and seniority up to the present time since under the employer's neutral seniority system, one used by almost all employers, she did not accrue seniority credit for the period of her lay-off. Under such a seniority system and under the *Evans* decision, her charge presumably would be timely for she would be currently suffering the "collateral effects" (lower rated seniority, pay, etc.) of a past act of discrimination.

Similarly, assuming that an employee was discriminatorily denied a transfer to a higher rated position in 1970, but remains an employee for thirty years thereafter and, at the end of thirty years, first files a charge of discrimination with the EEOC, her charge presumably would be timely under the *Evans* decision for she would be currently suffering the "collateral effects" (lower rated position) of a past act of discrimination.

The above examples are illustrative. The fact, however, is that in such cases and others, any period of limitations for Title VII action under Section 706 would be completely eliminated if the *Evans'* rationale were accepted. Clearly, Congress intended no such result.

Doubtless, every past act of discrimination has some future impact and continuing effects. As applied to Evans, although she now claims that because of her prior termination from employment a continuing adverse effect on her present pay and seniority exists, she is, in truth, suffering from fewer adverse effects than *Collins* or *Terry* who were not rehired and whose claims are barred. *Evans,* thus, results in a situation in which a former employee who is rehired and again begins to draw wages, fringe benefits and the like is given a right to the benefits

of her past employment despite her five year delay in filing a charge, whereas a former employee who is not rehired and remains adversely affected has no such rights.

The net effect of the Court of Appeals' final decision in *Evans*, thus, is to create different rights under the Act for former employees who are rehired and former employees who are not rehired. Those who are not rehired lose any claims based upon their former employment relationship unless they asserted such claims within 90 days as provided in Section 706(d). Those who are rehired have the right, under the *Evans* rationale, to assert such claims even though such claims were barred by Section 706(d) several years prior to rehire. In short, *Evans* means that the act of rehiring a former employee resurrects or revitalizes a claim already barred by time limits. This result is illogical and without support in the law. It obviously will not foster reemployment of former employees by employers, but will discourage reemployment.

Section 706(d) draws no distinction between claims by present employees and claims by former employees. Nothing in Section 706(d) permits claims to be asserted by present employees unless those claims were filed within the ninety day period from the date the act of discrimination occurred. In fact, Section 706(d) bars *all* claims not filed within ninety days, whether by present employees or not. There is no valid basis in the Act from which to draw a distinction in the application of Section 706(d) between present and former employees.

The error in *Evans* is that the Court of Appeals confuses the continuing *effects* of an act of discrimination with the *act* of discrimination itself. It does so in a situation wherein the act of discrimination was a definite and completed act, where there was a complete break in the employment relationship, where the underlying discriminatory policy has long been discontinued, where the aggrieved employee had more than ample opportunity to timely assert a claim but chose not to do so, and where (unlike other cases in which a

continuing discrimination has been found, such as in the departmental seniority cases) there is no ongoing seniority or other policy that properly can be said to have had its genesis in the original discriminatory practice or that was or is so inexorably tied to the former discriminatory practice as to represent merely a present extension of it. On the contrary, the *Evans* decision represents authority for the proposition that claims under Title VII, although previously barred by the time limitations under the Act, can at any time be "unbarred" by the mere fact of subsequent employment and the application of a completely neutral employment system, such as United's date-of-hire seniority system. As a result, it creates a license for an aggrieved person, irrespective of when the alleged discrimination occurred, to wait years before asserting a claim of discrimination, as did Evans. It effectively eliminates any period of limitations for Title VII actions.

CONCLUSION.

For the reasons stated above, United respectfully requests this Court to reverse the decision of the Court of Appeals and affirm the judgment of the District Court.

Respectfully submitted,

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December 16, 1976.

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

BRIEF FOR RESPONDENT

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INDEX

Table Of Authorities

Cases

PAGE

PAGE

LEGISLATIVE HISTORY

STATUTES

IN THE
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No. 76-333

UNITED AIR LINES, INC.,
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vs.

CAROLYN J. EVANS,
Respondent.

BRIEF FOR RESPONDENT

Respondent Carolyn J. Evans respectfully urges that the decision of the United States Court of Appeals for the Seventh Circuit be affirmed.

QUESTION PRESENTED FOR REVIEW

Can a current and continuing seniority practice which perpetuates the effects of past discrimination be held violative of Title VII of the Civil Rights Act of 1964?

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter the "Act"), 42 U.S.C. §2000e *et seq.*, specifically Sections 703(h), 706(e) and 706(g) thereof (42 U.S.C. §§2000e-2(h), 2000e-5(e), and 2000e-5(g).)

Section 703(h)

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29.

Section 706(e)

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings

with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Section 706(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 2000e-3(a) of this title.

STATEMENT OF THE CASE

In order to clarify both the record and the issues involved herein, and in light of certain statements and assumptions made in briefs *amici curiae* filed in support of Petitioner, Respondent Evans wishes to add the following to the summary offered by United in its Statement of the Case.

1. Carolyn Evans does not seek the four years of back pay which were lost as a result of United's unlawful termination of her in 1968; rather, she seeks seniority credit which she is currently being denied due to United's reliance upon her 1968 termination as a break in her service for current seniority purposes. The back pay and other relief sought in addition to seniority credit are limited to those benefits, wages, or perquisites which Mrs. Evans would have enjoyed since her February 16, 1972 rehire had she not been victimized by United's current practice with respect to her seniority, and were she instead being credited with seniority both from her original date of hire (1966) and for all periods she has actually worked for United (1966-68, and 1972 to the present).

There are thus *two* types of prospective seniority sought here — credit for actual service, on the one hand, and constructive seniority, on the other. Mrs. Evans is being denied *both*.

2. It is somewhat misleading to state that Mrs. Evans simply seeks a restoration of seniority she "lost . . . in 1968", because seniority has meaning only in a prospective on-the-job context. Carolyn Evans argued below, and the Court of Appeals accepted her position, that a "loss" has occurred and has been implemented on every day of her re-employment, continues to the present, and will

continue tomorrow unless checked. For example, whenever United determines Mrs. Evans' wages, her flight assignments, her fringe benefits, and whether or not she is to be laid off or recalled, it engages in its seniority practice. Each time, United has admittedly chosen to treat the 1968 termination as a break in service, and by currently relying on that past act, it has inexorably tied that past discrimination[1] to its present treatment of Mrs. Evans' seniority. Thus, Mrs. Evans' theory of relief, advanced both in District Court and on appeal, and accepted by the Court of Appeals, consists of two premises:

(a) That the "continuing practice" challenged is that ongoing seniority practice (the "continuing discrimination"), and that her charge was timely filed with respect thereto; and

(b) That said practice is *illegal* because it perpetuates the effects of past discrimination, and actively enables prior discrimination to reach effectively into the present. (Mrs. Evans thus finds herself with less seniority, fewer benefits, and less protection against layoff, than two types of similarly situated males: *i.e.*, males hired at the same time or later than she originally was, and males with the same or less actual length of service with United.)

3. Since (1) this case has arisen on a motion to dismiss the complaint, (2) a trial and opportunity to adduce evidence have yet to be afforded Mrs. Evans, and (3)

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[1] The "no-marriage rule" for stewardesses, which occasioned the 1968 termination, was found to be violative of Title VII in *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir., 1971) *cert. denied*, 404 U.S. 991 (1971).

opposing parties have incorrectly assumed that United's seniority practice with regard to Mrs. Evans is based upon a simple across the board continuous-time-in-service system, we wish to point out the following additional facts which we intend to prove at trial, if necessary, and which may be relevant to the Court's consideration of this case:

(a) Under United's collectively bargained seniority system as set forth in the applicable collective bargaining agreement(s) seniority is to be deemed broken by termination of employment in the case of a stewardess "*who resigns or whose services with the Company are permanently severed for just cause. . . .*" (1972-1974 Agreement between United and The Air Line Stewardesses and Flight Stewards as represented by The Air Line Pilots Association, International, Section 9D). Since Mrs. Evans' termination was neither a voluntary resignation nor a just cause discharge, and since we also expect to show, if necessary, that United in practice does from time to time credit ordinary rehires with past seniority, it is clear at the very least that the seniority *practice* she is challenging does not possess whatever bona fides or across-the-board consistency may be theoretically attributable to the overall *system* of seniority maintained by United. It is in this context that Mrs. Evans has consistently argued that she does not attack United's seniority system, but instead merely challenges United's current *practice* with respect to her seniority, whereby she is treated as having had a break in service and is thus wrongly placed in the seniority *system*. (As alleged in the complaint, Mrs. Evans filed a grievance, which United denied, under the collective bargaining agreement.)

(b) Mrs. Evans is prepared to prove that, upon her 1972 rehire, she was assigned the same personnel file number as she had during her 1966-68 period of employment. Thus, United obviously knew she was not a stranger when it rehired her.

SUMMARY OF ARGUMENT

As the Court of Appeals correctly reasoned, the root issue in this case is not whether Mrs. Evans' EEOC charge was timely filed. Since the employment practice here being directly challenged is United's current seniority practice with respect to Mrs. Evans (not the 1968 termination), and since the charge was timely filed with respect to that seniority practice, the real issue here is whether or not that challenged seniority practice is illegal.

The Court of Appeals correctly concluded that said practice is illegal because it perpetuates and actively gives present effect to prior post-Act discrimination against Mrs. Evans — namely, her prior illegal termination. This is so because United today relies on that termination as a break in service. Far from seeking mere redress for a past wrong, or confusing mere passive effects with substantive wrongs, Mrs. Evans seeks an end to a current seniority practice by which United chooses to visit its past bias upon her once again in a new form today. That the challenged seniority practice may be characterized as an offense of "omission" rather than "commission" is a purely semantic distinction devoid of significance under our legal system.

The Court of Appeals correctly applied settled and consistent legal principles — firmly grounded in the decisions of this Court, the several Courts of Appeal, and the expressed intention of Congress — and thereby

reached a sound and logical result. United has demonstrated neither the legal insufficiency of Mrs. Evans' claim, nor the inapplicability of her theory of relief to the facts she alleges.

Even more importantly, the result below withstands analysis on policy grounds. No new loophole in the Act's time limits is being opened here. As to the risk of stale claims, for example, the principle of laches is available to forestall any possible prejudice to prospective defendants' ability to defend competently. In the instant case, no prejudice has been alleged or shown, and to have required Mrs. Evans to file when United would have required her to (*i.e.*, within 90 days after her prior termination) would be to have the limitations period run and end before the offense was even committed. Thus, Carolyn Evans did not sleep on the rights she seeks to enforce here.

Evans is compatible with *Collins* v. *United Air Lines, Inc.*, 514 F.2d 594 (9th Cir., 1975), and no anomaly is thereby created between the rights of past discriminatees who are rehired and those who are not. The Seventh Circuit's decision will not discourage employers from rehiring former discriminatees; if anything, it will have the opposite effect. In *Collins*, the refusal to hire was not based on prior discrimination, nor was it even alleged to be, and so the offense charged was but a mere "shadow" of the past. Here, the current practice is a new one which is admittedly based on prior discrimination.

The *Evans* decision follows both the letter and the spirit of this Court's reasoning in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S. Ct. 1251 (1976), which recognized that attacks on post-Act seniority prac-

tices challenged as perpetuating the effects of prior post-Act discrimination are not barred by Section 703(h) and are thus cognizable under Title VII. Furthermore, *Franks* clearly disposed of the broad claim that the requested seniority relief in this case might have unsettling effects on other employees; and there is still ample room for the trial court to fashion an appropriate remedy to minimize any undue hardship.

But if this Court were to disturb *Evans*, the pre-established principles for which it stands would be undermined; Congress' express purpose would be undone; prior landmark decisions of this Court would be tacitly overruled, as would heretofore accepted rulings of at least six Courts of Appeal; and there would result a confusing and far-reaching retrenchment in derogation of the broad goal under Title VII of eradicating employment discrimination. Subtle but pervasive employment practices now recognized as illegal because they perpetuate the effects of past discrimination would no longer be subject to effective attack. In order to perserve the Act as Congress intended it to be used, the Court of Appeals' decision must be affirmed; Carolyn Evans must be allowed to proceed to the trial she deserves.

ARGUMENT

I.

The Time Limit Of Section 706(e) (Formerly 706(d)) Was Satisfied In This Case.

At the time Mrs. Evans filed her EEOC charge herein[2] (February 21, 1973), Section 706(e) of the Act required her to file within 180 days of the occurrence of the alleged unlawful employment practice. Mrs. Evans did so. There has therefore been no departure from the plain language of the Act.

The "employment practice" here being challenged is United's seniority practice with respect to Mrs. Evans. That practice is clearly current and continuing. It was occurring within 180 days of the day she filed her charge; indeed, it was occurring on the very day she filed her charge. She was injured by it then, is injured by it today, and will be injured by it in the future: United engages in and will engage in its challenged seniority practice whenever it makes flight assignments to Mrs. Evans, computes her paycheck, schedules her vacation, prepares to lay off or recall flight attendants, determines her pension entitlements, or utilizes "benefit"—or "competitive"--seniority in any other aspect of her employment. The fact is that United's practice is continuing in nature; whether that practice be viewed as one of "commission" or as one of "omission", a beguiling but purely semantic differentiation urged by *Amici* Airlines, is of no consequence. The practice exists, and it obviously is the product of United's present, continuing, conscious and deliberate selection of one of several possible courses

[2] As the Court of Appeals was informed at oral argument, the Commission accepted jurisdiction of Mrs. Evans' charge as timely.

of action or inaction with respect to Mrs. Evans' seniority status. (*Amici* Airlines' semantic argument that employer "inaction" cannot be viewed as a policy or practice, if accepted, would make a mockery of the common and statutory law of civil wrongs. For example, failure to pay minimum wages or overtime pay when due, failure to hire blacks or other minority persons, failure of an employer to pay contractually required pension contributions to a Taft-Hartley trust, and countless other traditional bases of suit are all litigiable wrongs of "inaction".)

The proposition, accepted by the Court of Appeals here, that a charge filed during the operation of a continuing employment practice or policy is timely, has been firmly established. There is no attack being made here upon a Congressionally mandated time limit; rather, Mrs. Evans' theory of timeliness is in clear accord with Congressional intent, and failure to accept that theory would ignore that intent.

Congress clearly anticipated and provided for the possibility that there could be "continuing violations" and that a charge could be timely filed over 180 days after the *commencement* of a practice but during the ongoing operation thereof. This is the clear import of the 1972 provision, in Section 706(g) of the Act (*supra*), that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission". For the quoted provision would have meaning *only* in a case such as this—where the challenged practice or policy, and the injury resulting therefrom, are of a continuing nature.

That this was in fact the true Congressional intent is confirmed by the legislative history of the 1972 Amendments to Title VII. The Conference Report adopted by both the House and the Senate contained the following

language in reference to §706(e) (the time limits provision):

> "This subsection provides that charges be filed within 180 days [or 300 days if proceedings are filed with a state or local agency] of the alleged unlawful employment practice. *Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued,* and other interpretations of the courts maximizing the coverage of the law are not affected", 118 Cong. Rec. 7167 (Senate, March 6, 1972); 118 Cong. Rec. 7565 (House, March 8, 1972). (Emphasis added.)

If that principle of continuing wrongs is not applied here, then it cannot logically be applied at all and the foregoing language would be rendered meaningless.

In accepting Mrs. Evans' theory of timeliness based upon the existence of a continuing employment policy or practice, the Seventh Circuit acted in accordance with widely established case law on point—much of which existed when Congress amended Title VII in 1972[3]—covering a wide variety of "continuing practice" situations

[3] As the 1972 Conference Report noted: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII". 118 Cong. Rec. 7564 (House, March 8, 1972). This was noted in *Franks, supra,* 424 U.S. at 765, n. 21.

(including many wherein a facially neutral seniority practice was being challenged).[4]

As one court aptly summarized the state of the law:

> "It is clear that the filing of a charge with the EEOC within 90 days [extended to 180 or 300 days in 1972] after the alleged unlawful practice occurs is a jurisdictional prerequisite to a subsequent court suit under Title VII. . . . However, if the alleged violation is

[4] *Bartmess* v. *Drewrys U.S.A., Inc.* 444 F.2d 1186 (7th Cir. 1971), *cert. den.* 404 U.S. 939 (1971); *Cox* v. *U.S. Gypsum Company,* 409 F.2d 289 (7th Cir., 1969); *Burwell* v. *Eastern Air Lines,* 394 F.Supp. 1361, 1367 (E.D. Va., 1975) (loss of seniority); *Tippett* v. *Liggett & Myers Tobacco Co.,* 316 F.Supp. 292 (M.D. N.C., 1970) (loss of seniority); *Healen* v. *Eastern Air Lines,* ..... F.Supp. ....., 8 FEP Cases 917 (N.D. Ga., 1973) (loss of seniority); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979 (D.C. Cir., 1973); *Sciaraffa* v. *Oxford Paper Co.,* 310 F. Supp. 891 (D.Me., 1970); *Kohn* v. *Royall, Koegel & Wells,* 59 F.R.D. 515 (S.D. N.Y., 1973); *app. dism.* 496 F.2d 1094 (2d Cir., 1974); *Watson* v. *Limbach Company,* 333 F.Supp. 754 (S.D. Ohio, 1971); *Jamerson* v. *Trans World Airlines,* ..... F.Supp. ....., 11 FEP Cases 1475 (S.D. N.Y., 1975) (loss of seniority); *Jamison* v. *Olga Coal Co.,* 335 F.Supp. 454 (S.D. W.Va., 1971); *Moreman* v. *Georgia Power Co.,* 310 F.Supp. 327 (N.D. Ga., 1969). Moreover, said rationale implicitly underlies the acceptance of plaintiffs' theory of relief in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), where this Court permitted continuing discriminatory practices and policies to be challenged under Title VII, and the several Court of Appeals and other cases cited in Part II of this Brief, wherein continuing seniority, transfer and other practices were challenged as illegal for perpetuating the effects of past discrimination and the time limits of the Act were implicitly assumed to be satisfied. Thus, for example, *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 795-796 (4th Cir., 1971), *cert. den.* 404 U.S. 1006 (1971) stands for the proposition that a facially neutral seniority practice which perpetuates the effects of past discrimination is in fact a continuing violation of Title VII.

deemed to be 'continuing', it has been consistently held that the 90 day period does not bar an ensuing court action". *Sciaraffa* v. *Oxford Paper Company, supra*, n. 4, 310 F.Supp. at 896.

From the very outset of this case, Mrs. Evans has conceded both that the timely filing of an EEOC charge is a jurisdictional prerequisite to suit, and that, were she simply and solely attacking her 1968 termination, rather than a current employment practice, her claim would be time-barred. Conversely, United has never disputed the proposition that if its challenged current seniority practice is unlawful under the Act, then Mrs. Evans' EEOC charge was timely filed. Thus, the real issue here has nothing to do with time limits; rather, the question is, purely and simply, is the challenged seniority practice *unlawful?* The Court of Appeals correctly decided that issue in the affirmative.

II.

United's Current Seniority Practice Is Unlawful As Applied To Mrs. Evans Because It Is Based On, And Perpetuates The Effects Of, Prior Discrimination.

Carolyn Evans was no stranger to United Air Lines when she was reinstated in 1972, and United knew it. By relying on the 1968 termination as creating a break in service, and giving effect to that break in service in its current seniority practice with respect to Mrs. Evans, United is actively enabling that prior discrimination to reach effectively into the present. United thus visits new losses upon Mrs. Evans and creates a present disparity, for Mrs. Evans finds herself at a significant disadvantage as compared with male flight attendants who (1) were hired between 1966 and 1972 (i.e., at the same

time or even later than she originally was) and/or (2) have less actual length of service than she has.

In ruling that United's seniority practice is therefore unlawful with respect to Mrs. Evans, the Seventh Circuit followed Title VII case law which had been previously established by numerous Courts of Appeal as well as this Court, and in many other decisions. These cases largely preceded the 1972 amendments to Title VII, and must be presumed to have Congressional approval (see note 3, *supra*). In fact, further language in the 1972 Conference Report supports the proposition that an employment seniority practice which perpetuates the effects of past discrimination is within the purview of Title VII. The Report notes, with respect to Section 706(g), that the "courts have stressed" that the attainment of Title VII's make-whole objective

> "rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires *that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination*". 118 Cong. Rec. 7565 (House, March 8, 1972); 118 Cong. Rec. 7168 (Senate, March 6, 1972). (Emphasis supplied). (The word "aggrieved" here used by Congress in referring to persons suffering the effects of discrimination is the same word which appears in Section 706(b) of the Act, as amended, describing those whose charges are subject to the processes of Title VII.)

Moreover, as this Court noted in *Franks, supra*, 424 U.S. at 765, n. 21, the Senate Report specifically referred to the problem of "perpetuation of the present effect of pre-Act discriminatory practices through various insti-

tutional devices". S. Rep. No. 415, 92d Cong., 1st Sess., at 5 (1971).

As the Seventh Circuit noted in its opinion below (Appendix, at 40, n. 15), this Court stated in *Griggs, supra*, 401 U.S. at 430:

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[5]

In some respects, *Evans* is a more compelling case for relief than *Griggs*. In *Griggs*, the employer's practices were found discriminatory because they perpetuated the effects of past discrimination, even though that past discrimination antedated Title VII and also was in part *not even the legal responsibility of the defendant employer*. The statistical disadvantage suffered by blacks in that case under testing and diploma requirements was, rather, a perpetuation of the effects of "society's" past socio-economic discrimination in education and environment, as to which the employer therein could never have been held

[5] The fact that United may have discriminated "unintentionally" is thus irrelevant, as this Court has often reiterated:

> "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation'. Griggs v. Duke Power Co., supra, 401 U.S., at 432, 91 S.Ct., at 854. See also Watson v. City of Memphis, 373 U.S. 526, at 535, 83 S.Ct. 1314, at 1319-1320, 10 L.Ed.2d 529; Wright v. Council of City of Emporia, 407 U.S. 451, at 461-462, 92 S.Ct. 2196, at 2202-2203, 33 L.Ed.2d 51." *Albermarle Paper Company* v. *Moody*, 422 U.S. 405, 422, 95 S.Ct. 2362, 2374 (1975).

liable. Here, the past discrimination which United now actively perpetuates through its current practice is in fact *its own*, is subject to little dispute, and was in fact ruled illegal in *Sprogis, supra.*

Indeed, the major point of distinction really being made by *Amici* Airlines as to *Griggs* and the Court of Appeals cases cited below is that the current practices there challenged were acts of "commission" whereas *Evans* allegedly involves a practice of "omission"; the logical and practical untenability of this distinction has already been noted above. Far from challenging United's "failure to remedy" a time-barred wrong, Mrs. Evans attacks a current practice which *gives new effect* to a past wrong, and which does so in a uniquely damaging way. Moreover, the analogy suggested by *Amici* Airlines (on p. 23 of their Brief) to distinguish *Griggs*, that is, the example of a one-time denial of a salary increase—is totally inapposite. Denial of relevant seniority—unlike a one-time denial of a salary increase—continually affects *in futuro* the entire gamut of benefits to be derived from the employment relationship as well as the very existence of that relationship in times of business stress. Moreover, just as the policy of denying future salary increases to an employee who suffered a past denial thereof is illegal for perpetuating the effects of past discrimination (which *Amici* suggest *would be* a cognizable injury under *Griggs*), so too, United's practice here forever denies or curtails a whole realm of future benefits to Mrs. Evans, by today treating her as having had an immutable break in service in the past and thereby perpetuating past bias into the future. Of course, *Amici* themselves undermine the impact of their own analogy by stating their recognition that there can be valid challenges to seniority practices under *Griggs* (p. 22, n. 17); the fact that Mrs. Evans challenges

a mere seniority "practice" rather than seeking to dismantle the "system" as a whole is, if anything, even *more* reason to grant her the relief she seeks, since the principle is identical while the relief is less cataclysmic. (Moreover, United's claim that this is not a so-called "pattern and practice" suit is a difference in procedural form, not substance. It would indeed be remarkable if this Court were to penalize a private litigant for having initially filed her suit as an individual rather than as a class action. As it happens, there may well be many other stewardesses who find themselves suffering from the same wrong. Only a trial can settle that question.)

In *Acha* v. *Beame,* 531 F.2d 648 (2d Cir., 1976), the Court of Appeals, in reversing dismissal of the complaint, held that a facially neutral, date-of-hire seniority system (like United's here) was discriminatory *as applied to plaintiffs* because it perpetuated the effects of past sex discrimination against them (there, a previous refusal to hire based on sex).[6] By relying on date-of-hire in computing seniority in the case of the identifiable victims of past hiring bias, the employer disadvantaged said plaintiffs as compared with males who were hired at the same time or later than plaintiffs would have been had the prior discrimination not occurred. Similarly, by relying on date-of-rehire and treating her prior illegal termination[7] as a break in service, United has disadvantaged

[6] In that case, EEOC charges were filed well beyond the 706(e) limitation period with respect to the hiring discrimination but, as here, during the pendency of the seniority practice. There, as here, it was the seniority practice that was being attacked.

[7] This Court recognized in *Franks, supra,* 424 U.S. at 768, that discriminatory hiring and discharges are "related 'twin' areas".

Mrs. Evans as compared with males hired at the same time or later than she originally was, and males with less length of service than she actually has.

In fact, virtually every other Circuit Court of Appeals which has had an opportunity to rule on the issue, and whose ruling has either not reached or has been left undisturbed by this Court, has held, as did the Seventh Circuit, that if, as here, a current, facially neutral seniority practice perpetuates and locks in the effects of prior discrimination, then that current practice will be found unlawful under Title VII even if the policies which gave rise to the past discrimination are no longer in effect. *U. S.* v. *Bethelehem Steel Corp.,* 446 F.2d 652 (2d Cir., 1971); *Robinson* v. *Lorillard Corp.,* 444 F.2d 791 (4th Cir., 1971), *cert. den.* 404 U.S. 1006 (1971); *Local 189, United Papermakers* v. *U.S.,* 416 F.2d 980 (5th Cir., 1969), *cert. den.* 397 U.S. 919 (1970)[8]; *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 236 (5th Cir., 1974); *Head* v. *Timken Roller Bearing Co.,* 486 F.2d 870 (6th Cir., 1973); *U.S.* v. *N.L. Industries,* 479 F.2d 354 (8th Cir., 1973); *Jones* v. *Lee Way Motor Freight, Inc.* 431 F.2d 245 (10th Cir., 1970), *cert. den.* 401 U.S. 954 (1971). The EEOC has ruled the same way in a case virtually on all fours with *Evans, EEOC Dec. No. 71-413,* 3 FEP Cases 233 (1970). (This Court ruled in *Griggs, supra,* 401

[8] As noted in *Kennan, infra,* a 1972 Senate Report cites *Papermakers* as a case which has which has "contributed significantly to the Federal effort to combat employment discrimination". S. Rep. No. 92-415, 92nd Cong., 2d Sess. 5 (1972). *Evans* is an even more compelling case for relief than *Papermakers,* where the past discrimination occurred prior to the 1965 effective date of Title VII.

U.S. at 434, that the Commission's interpretations of Title VII are entitled to great deference.)[9]

Moreover, the one pertinent major appellate case upon which this Court has ruled and which heretofore had provided possible contrary authority—*Jersey Central Power & Light Company* v. *International Brotherhood of Electrial Workers,* 508 F.2d 687 (3d Cir., 1975)—was vacated and remanded for further consideration in light of *Franks. E.E.O.C.* v. *Jersey Central Power & Light Co.*, ... U.S. ....., 96 S.Ct. 2196 (1976).[10]

As the Fifth Circuit said in *Papermakers*:

> "Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias." 416 F.2d at 988.

So, too, every time Carolyn Evans (or another similarly-situated female) bids against a male flight attendant, or is involved in any employment event tied to either "benefit"

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[9] Among the many other cases in accord with this rationale are the closely analogous *Tippett, Healen, Burwell,* and *Jamerson* cases, *supra,* and *Payne* v. *Travenol Laboratories,* 416 F.Supp. 248, 12 FEP Cases 770 (N.D. Miss., 1976). See also *Marquez* v. *Omaha District Sales Office,* 440 F.2d 1157 (8th Cir., 1971); *Nance* v. *Union Carbide Corp.*, ... F.2d ....., 13 FEP Cases 231, 238-239 (4th Cir., 1976).

[10] *Watkins* v. *United Steel Workers,* 516 F.2d 41, 44-45 (5th Cir., 1975), is distinguishable from the instant case in that there, unlike here, the plaintiffs challenging the seniority practice were not the *identifiable victims* of past discrimination, as the Court there made clear in its meticulously worded holding. This distinction was noted in *Payne, supra,* 416 F.Supp. at 265, and is significant in light of *Franks* and *Acha, supra.*

or "competitive" seniority, the old sexual classification (i.e., the no-marriage rule for females) is reasserted by United, and she suffers anew for United's previous bias.

One of the many applicable cases in the *Papermakers* line is the strikingly parallel decision in *Tippett* v. *Liggett & Myers, supra,* n. 4. In that case, female plaintiffs had been discriminatorily laid off from the bottom of the then female seniority list in July, 1965. They were still separated from employment when, *two years later,* the employer computed a "permanent rate", based upon the 90 days ending May 31, 1967, which allowed active employees previously segregated by race and sex to transfer among departments without a reduction in wages. Plaintiffs were not then employed and therefore were not assigned a "permanent rate". They recommenced their employment in June, 1967, but waited *nearly a year* before filing EEOC charges on May 18, 1968.

Liggett & Myers made the same arguments advanced by United here—that the charge was untimely and that no present discrimination was taking place. The Court refused to accept these arguments, realizing that to do so would allow the employer in that case—like United here—to use "its own earlier unlawful discrimination . . . as an excuse to continuously repeat and multiply its further acts of unlawful discrimination." (316 F.Supp. at 295). The Court found the ongoing denial of seniority (permanent rate status) to plaintiffs and the resulting disparity with similarly-situated males to be a continuing violation of Title VII—because it perpetuated the effects of past discrimination. This was a case, said the Court,

> "of prior discrimination reaching effectively into the present. Placed behind all employees holding a permanent rate, plaintiffs would conceivably be subject

> to lower wages, greater risk of future layoffs, and diminished chances of promotion and transfer." (316 F.Supp. at 296).

Unlike men originally hired at the same time or even after they were, the *Tippett* plaintiffs were continuously denied the seniority advantage of permanent rate status which they would have had but for prior discrimination as presently made effective. Similarly, Mrs. Evans—unlike males hired between 1966 and 1972—is continuously being denied the seniority status she would have had but for United's past discrimination and present practice towards her. In both cases, these women returned to work only to suffer from current on-the-job seniority disparity traceable to past discrimination.

United argues that the application of this widely accepted rationale to the case at bar "effectively eliminates the time limitation set forth in Section 706(d) [now 706(e)] of the Act", and could revive stale claims of many years' vintage. This alarmist position is unsound for several reasons.

First, the established principles for which *Evans* stands do not constitute an unfair trap for the innocent employer. Carolyn Evans has in fact filed a timely charge vis-a-vis the challenged employment practice. That seniority practice is no mere "effect"—it is an *active policy* which creates a current disparity. United itself opened the door to this litigation by explicitly relying in the present on its own past discrimination to penalize in a new way its own prior victim; United has no one to blame but itself. Under the circumstances, United is knowingly responsible for the relation between its present practice and its past discrimination.

Second, consistency and logic dictate that to deny the applicability of the rationale adhered to by the Seventh

Circuit in this case would be to deny its applicability to the many cases set forth above, including rulings by the Second, Fourth, Fifth, Sixth, Eighth and Tenth Circuits as well as this Court, and would throw heretofore settled employment discrimination law into a state of chaos. For United is not merely seeking to preserve a time limitations rule; that rule is not in issue. United is asking this Court to reject an established, substantive principle of Title VII law; it is asking this Court to declare that an employer may deny benefits to or otherwise injure an employee by applying to that employee a current facially neutral employment practice which creates a current disadvantage and disparity by giving present effect to prior discrimination against that employee by that employer. If that is so, the result would be disastrous. It would mean, in effect, that facially neutral employment practices—such as the invidious practices this Court struck down in *Griggs*—would no longer be attackable, no matter how damaging and pervasive they were. Where a present policy is not facially neutral, it is of course attackable *per se;* bu where, as in *Griggs,* the present policy is facially neutral, the attack must perforce be based upon the fact that the challenged practice perpetuates and locks in the effects of past discrimination. United seeks an end to such challenges and would thwart Congress' purpose in enacting Title VII.

Thus, United does not seek to prevent the opening of a new floodgate; rather, it seeks to close a well-traveled avenue of relief. And, although they have recently been subjected to a great deal of publicity, there is no reason to believe that the cases in which, as here, a seniority practice is challenged as perpetuating the effects of prior discrimination would not continue to constitute a relatively small percentage of Title VII cases. Fur-

thermore, of those cases that do arise, established law has placed even further limits. First, under *Evans,* this Court's ruling in *Franks, supra,* and the *Acha* case, *supra,* only the identifiable victims of past discrimination would be entitled to relief; moreover, as noted above, in 1972 Congress limited retroactive back pay relief to two years prior to the date of the charge, and if further limitations are to be placed, Congress may do so. (Mrs. Evans seeks only *one* year's backpay differential).

But even without Congressional action, the Courts already have ample tools available to protect against the risk of litigation of truly stale claims. For one, the staleness of a claim may well hurt the potential *plaintiff* as much as, or even more than, it hurts the potential defendant, and will obviate the risk of prejudice to defendant. Under Title VII, it is well established that plaintiff must bear the burden of proving a prima facie case. Where plaintiff is proceeding on the theory of relief advanced here, that burden is even greater. The plaintiff's own credibility and competence to testify may be impaired by passage of time. And he must still bear the burden of proving past discrimination, a present act in perpetuation thereof, a current disparate effect thereof, that he himself was an actual victim of both the past discrimination and the current practice, and that the two are related as to him.

More importantly, if the defendant can demonstrate prejudice (which United has failed to even allege here), the Court may apply *the principle of laches,* and may deny relief (despite a technically timely filing) on that basis. (See, for example, *EEOC* v. *American National Bank,* ..... F.Supp. ....., 13 FEP Cases 572 (E.D. Va., 1976).) Indeed, the Ninth Circuit, which has approved

Evans (as noted below), tacitly applied the doctrine of laches in *Griffin, infra* (Part III), where plaintiffs sued under 42 U.S.C. §1981 in 1971 for seniority credit for time lost as a result of allegedly discriminatory layoffs over 20 years earlier; the Court held that "in these circumstances" suit was barred. 478 F.2d at 1120.

Naturally, laches should not be applied to *Evans.* Here, it is unlikely that the past discrimination will be subject to much factual dispute as to key dates, events, etc.; the prior bias was part of an open, admitted, and across-the-board policy which has been decreed unlawful by the Courts, and has been the continual subject of wide-spread litigation. There has been no showing of prejudice to United in preparing its trial defense on the merits. Moreover, the very speed with which this case reached this Court evidences the fact that the controversy largely turns upon questions of law rather than difficulties in unearthing the facts.

To require Mrs. Evans and other plaintiffs like her to file charges of this nature sooner would create an illogical and untenable situation. For one thing, until she was re-employed, Mrs. Evans had no idea whether United would re-employ her and whether it would give her credit for her prior service or not. (In practice, we understand United sometimes has given ordinary rehires prior service credit.) Seniority is meaningful only prospectively, and on-the-job. To force Mrs. Evans to file charges and/or a lawsuit sooner, far from eliminating stale claims, would have been to force her to burden the already flooded EEOC and the Courts, at her and the taxpayers' expense, with a premature challenge to a seniority practice which did not yet affect her *and which did not yet even exist as to her.* United's argument, if accepted, would

thus have the limitations period end *before the offense is committed.*

Although it is true that Mrs. Evans filed her charges a year after her rehire, she is still entitled to relief. First, as a matter of law, since the challenged offense is a continuing one, she clearly was legally timely. Second, as for the question of whether or not the principle of laches should nevertheless bar her from relief, several factors apply in her favor. For example, she filed a grievance soon after her probationary employment status ended (see Respondent's Brief in Opposition to Petition, at 3, n. 2), putting United on notice well before a year had passed. Further, as one commentator on the *Evans* case recently noted:

> ". . . . [G]iven the novelty of her claim and the fact that she, like most other Title VII claimants, is not a lawyer, one year is hardly an unconscionable period, particularly on a claim of continuing wrong. Just as Title VII plaintiffs are not held to professional pleading standards . . ., so they ought not to be held to the standards of expedition demanded of corporate employers advised by specialized counsel on permanent retainers."[11]

Under the circumstances, this is a case for the Court to conclude, on equitable grounds, that the interest of protecting defendant from stale claims is outweighed by the interests of justice in vindicating plaintiff's rights. *Burnett* v. *New York Central R.R. Co.,* 380 U.S. 424, 428 (1964).

The theory of relief necessarily accepted by the Seventh Circuit in this case has historically been applied in

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[11] Douglass T. Cassel, Jr., Draft of Annual Review of Seventh Circuit Civil Rights Decisions to be published in the forthcoming issue of the Chicago-Kent Law Review, at 10-11 (1976). *See* also *Love* v. *Pullman,* 404 U.S. 522 (1972).

situations, like this one, where the challenged action by the employer is a *seniority* practice; in such cases, the practice is characteristically of a continuing nature and, while uniquely future-oriented, is perforce tied to employment history and past actions affecting length-of-service. There need be no fear that the rationale which was once again correctly applied by the Court of Appeals here in a seniority context will be dramatically extended beyond its present scope. Were that to occur in some future case, the time for review by this Court would be then—not now.

United suggests that it is not unreasonable to require Carolyn Evans to have taken timely steps at the time of her termination to protect her rights. The claim Mrs. Evans could have pressed in 1968 is not being "unbarred" here. For not challenging the 1968 termination at that time, Mrs. Evans, like the plaintiffs in the seniority cases cited above, has in fact already suffered an appropriate permanent and irretrievable loss of rights—chiefly, four years of back pay (1968-1972) which are concededly beyond the scope of this litigation. The seniority cases cited above involved past discrimination only because and to the extent that the employers there chose to actively perpetuate the past bias through their current practices. Similarly, this case involves the 1968 termination only because, and to the extent that, United has chosen to rely on that past discrimination and actively perpetuate in new form certain effects thereof through its current practices. Mrs. Evans seeks redress only for the injury and disadvantage she has suffered since her reinstatement due to the current seniority practice which she is challenging herein. Is it any less reasonable to require United to bear the responsibility for its present

actions, whereby it openly uses its own past discrimination as an excuse to deny Mrs. Evans benefits today?

In sum, if *Griggs* and the *Papermakers* line of cases are still the law of the land (as Congress assumed when it acted in 1972), then *Evans* must be affirmed. If the bases for reversal asserted by United and *Amici* are accepted, what heretofore had been solidly established and accepted law in furtherance of the express will of Congress will have become hollow echoes of a time when the eradication of employment discrimination was truly a national goal of the highest priority.[12]

III.

The Cases Adduced By Opposing Parties Are Inapposite.

Mrs. Evans' position, and the conclusion of the Seventh Circuit, withstand close consideration of the cases which have been cited against her.

Of the cases cited by United, many stand simply for the general proposition that satisfaction of the Act's time limits is a jurisdictional prerequisite to suit. The parties agree on that score. Other cases are also vulnerable in that they are prior decisions of the Seventh Circuit,

[12] Such an adverse decision would not only wipe out important advances made to date, and insulate from attack practices which this Court has itself condemned; in the seniority area especially, it would also necessarily cause continual future repercussions for the past, present and future victims of employment discrimination. Whatever gains—both voluntary and by court order—are made in eradicating job bias, those gains will have been harder to achieve, and will always be subject to being swept away, as by layoff of rehired discriminatees, through the use of seniority practices such as that being challenged here.

which cannot be used now to bar *Evans*, and in any event involved unrelated fact patterns. Most of the remaining cases either involved only discharges and nothing more—unlike the case at bar, wherein a current and continuing on-the-job seniority practice has been challenged—or are otherwise easily distinguished. Thus for example, in *Griffin* v. *Pacific Maritime Assoc.*, 478 F.2d 1118 (9th Cir., 1973), *cert. denied*, 414 U.S. 859 (1973), plaintiffs' Title VII claim was deemed barred for failure to exhaust administrative remedies since they had filed no charges at all with any appropriate agency; the other statute pursuant to which they proceeded—42 U.S.C. §§1981 and 1985—is not in issue here. The case is also distinguishable on the merits, as discussed above. In *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir., 1975), there was apparently no allegation that the current refusal to hire was in fact *based* on the prior refusal to hire. The employer had thus not tied the past refusal to the current refusal. (The charge was therefore found timely in relation to the current refusal and an earlier charge, filed beyond the time limit in relation to the earlier refusal, was found untimely since that was the only practice attacked in that earlier charge.)

In *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F. Supp. 195 (W.D. Va., 1969), although plaintiff contended that the discriminatory policies which gave rise to his transfer were of a "continuous" nature, his complaint attacked not those "continuous" policies (he did not apparently allege that he had been injured by them after his transfer and within the timely filing period preceding his charge) but merely directly attacked the transfer itself. His charge was untimely as to *that transfer*, the alleged unfair employment practice. Here, by contrast, Mrs. Evans is directly attacking a continuing

seniority practice which is being implemented and causes injury to her today, and her charge was timely *as to that alleged unfair employment practice.*

In *Buckingham* v. *United Air Lines, Inc.,* ..... F.Supp. ....., 11 FEP Cases 344 (C.D. Cal., 1975), the transfers occurred prior to the 1965 effective date of Title VII (and were thus not unlawful); furthermore, neither the pre-Act transferees nor the post-Act terminees could directly challenge the "no-marriage" rule or the agreement ending it (which was consummated within 90 days of the date they filed charges) since they could not show that they themselves were unfairly injured by the rule or the agreement within the 90-day period (the transferees were not then stewardesses and the terminees were not then employees). Similarly, the key distinction in *Kennedy* v. *Braniff Airways, Inc.,* 403 F.Supp. 707, 709 (N.D. Tex., 1975) is that there—unlike here—the past discrimination occurred *prior* to the effective date of Title VII, as the Court took pains to point out; we also note that the case pre-dates this Court's ruling in *Franks, supra.*

Cates v. *Trans World Airlines,* ..... F.Supp. ....., 13 FEP Cases 201 (S.D. N.Y., 1976), *app. pending,* No. 76-7420 (2d Cir.), is entirely distinguishable on its facts: Of the three named plaintiffs, two (Cates and George) filed EEOC charges *over a year and a half after they were laid off pursuant to the challenged seniority practice,* and the Court in fact assumed their day of layoff was the last day on which the seniority practice operated against them (13 FEP Cases at 208). As to the third (Whitehead, discussed in the passage quoted by United), the Court found that he had never actually been denied employment (13 FEP Cases at 208). Unlike Cates and

George, Mrs. Evans filed charges *during* the pendency of the seniority practice, and thus was timely. And, unlike Whitehead, Mrs. Evans is an *identifiable victim* of past discrimination, and is thus entitled to relief. Furthermore, much of the District Court's reasoning in *Cates* is suspect in light of the Second Circuit's scholarly decision in *Acha* v. *Beame, supra.*

The result in *Turnow* v. *Eastern Airlines,* ..... F.Supp. ....., 13 FEP Cases 1227 (D.N.J., 1976), is similarly consistent with the result in *Evans.* There, the Court in fact held that the latest date upon which plaintiff could timely file charges challenging her seniority status was 180 days after her *post-rehire furlough—not* 180 days after the termination which antedated her rehire. Thus, Mrs. Evans' charge here was timely even under *Turnow.*

None of the cited court cases arising under Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), involved situations similar to the one at bar—where a present employee challenges a present seniority practice which is admittedly *based on* and gives present effect to prior discrimination by the same employer against that employee. Moreover, all of those cases, having been decided under the NLRA rather than Title VII, were not subject to Title VII's legislative history, which, as set forth above, shows that Congress' purpose encompasses both the "continuing violation" theory and the "perpetuation of past wrongs" principle espoused herein.

In *Local Lodge No. 1424* v. *N.L.R.B.,* 362 U.S. 411, 416-417, 80 S.Ct. 822, 826-827 (1960), this Court was not faced with a situation where the charged party *itself* chose to follow a *new* course of action by which *it* actively relied upon and gave new and pervasively damaging effect to a past wrong; rather, the claimed violation—enforce-

ment of a collective bargaining agreement with an allegedly invalid union security clause—was but a "mere shadow" of the original violation, that is, execution of that same agreement. Unlike the Board in *Lodge No. 1424,* it is not Mrs. Evans who relies on the past to "cloak with illegality" a present act; here, United itself engages in a new course of action by which it taints itself.

American Federation of Grain Millers v. *NLRB,* 197 F.2d 451 (5th Cir., 1952), was decided under the NLRA by the same Circuit which, seventeen years later, issued the Congressionally-approved *Papermakers* decision (*supra*) under Title VII, and involved primarily refusals to bargain and refusals to re-employ strikers who had already been permanently replaced. No on-the-job practices like that alleged here were involved. The Court agreed with the Board that the statute of limitations with respect to a refusal to bargain begins to run with the *first refusal*—as contrasted with Title VII, as to which Congress has clearly stated that the *latest* occurrence of a continuing practice will serve as a focal point of timeliness. *NLRB* v. *McCready & Sons, Inc.,* 482 F.2d 872 (6th Cir., 1973), is distinguishable on the same ground.

Similarly, *NLRB* v. *Pennwoven, Inc.,* 194 F.2d 521 (3d Cir., 1952), and *NLRB* v. *Textile Machine Works, Inc.,* 214 F.2d 929 (3d Cir., 1954), both antedated Title VII; they did not involve new on-the-job practices, or practices admittedly based on past wrongs, like that alleged here, but rather involved refusals to recall and rehire certain employees. (Interestingly, the Court held in *Pennwoven,* under the NLRA, that the statute ran not from the time of termination but rather from the time the employees were first not offered reemployment.) And unlike the seniority practice challenged here, the challenged non-

employment was merely a "shadow" of the discharge. See *Kennan, infra.*

NLRB v. *Childs Co.,* 195 F.2d 617 (2d Cir., 1952), was also a non-Title VII case involving a claim for rehire rather than an on-the-job seniority problem. Under Title VII, the Second Circuit has clearly taken a different position in *Acha* and other cases, cited above, putting it squarely on record as espousing the principle that on-the-job seniority practices which perpetuate the effects of past discrimination are present and continuing wrongs, and that challenges directed thereto are not dismissable as simple attempts to litigate the past wrong.

The few additional Title VII decisions cited by *Amici* as supporting their interest in this cause are not applicable here. *Cisson* v. *Lockheed-Georgia Co.,* 392 F.Supp. 1176 (N.D. Ga., 1975), involved a challenge to a one-time demotion, *not* a seniority practice like the one challenged here. (Also, compare, *Marquez, supra,* n. 9.) In *Stroud* v. *Delta Air Lines, Inc.,* 392 F.Supp. 1184 (N.D. Ga., 1975), *appeal docketed,* No. 76-2130 (5th Cir., May 21, 1976), plaintiff stewardess' termination occurred before Title VII became effective and she had never been rehired. (No on-the-job seniority practice was in issue.) And, significantly, Judge Freeman—who decided both *Cisson* and *Stroud*—modified his views less than one month later in *Stroud* v. *Delta Air Lines, Inc.,* 10 FEP Cases 498, 499 (N.D. Ga., 1975), wherein he recognized that *seniority practices* which perpetuate the effects of past discrimination are continuing wrongs under Title VII.

In *Culpepper* v. *Reynolds Metals Co.,* 296 F.Supp. 1232 (N.D. Ga., 1969), *rev'd on other grounds,* 421 F.2d 888 (5th Cir., 1970), the challenged employment practice was the denial; not of seniority and its perquisites, but of the award of a bid-for-job.

Lastly, in *Smith* v. *OEO for Arkansas,* 538 F.2d 226 (8th Cir., 1976), plaintiff challenged nothing more than a one-time refusal to hire and could argue no more than that his non-employment was continuing.

In virtually all of the other cases cited by opposing parties—with the *seeming* exception of *Collins,* discussed *infra*—the only practice being challenged was the actual discharge. None of those cases involved an attack upon a current and continuing seniority practice such as that being challenged here by an employee who is today suffering injury *on the job* because of it. That practice is a continuing one, whereas a discharge, standing alone, is not.

That distinction is critical—for, as the Eighth Circuit noted in *Olson* v. *Rembrandt Printing Co.,* 511 F.2d 1228, 1234 (8th Cir., 1975).

> "The rationale underlying the allowance of actions for continuing discrimination is to provide a remedy for past actions which operate to discriminate against the complainant at the present time."

IV.

Collins And Evans Are Compatible—There Is No Conflict Among The Circuits.

As Judge Cummings noted in dissenting to the Court of Appeals' first opinion (Appendix, at 30):

> "The alleged continuing discrimination in *Collins* was the failure to rehire plaintiff. Title VII, however, imposes no obligation on the employer to hire anyone *unless the refusal is motivated by discrimination.* There is no evidence in *Collins* that the decision not to rehire the plaintiff was based at all *upon the past act of discrimination.*" (Emphasis supplied.)

Unlike the case at bar, there was no allegation in *Collins, supra,* that United's refusal to rehire her was *based* at all

upon her 1967 termination; rather, plaintiff in *Collins* in effect sought to have the Ninth Circuit declare that the failure to rehire was *per se* unlawful simply because her continuing non-employment to that point was attributable to the prior discrimination. *Collins* thus was truly challenging the mere passive effects of the prior termination and nothing more; no present act of United, either on or off the job, was actually *based* on that prior discrimination.

This is a crucial difference. United incorrectly states that the Court of Appeals confused the *effects* of an act of discrimination with the *act* of discrimination itself. Rather, in likening *Collins* to *Evans,* United has confused the mere passive effects of past discrimination (*Collins*) with a present act or practice, explicitly *based* on the past discrimination, which gives new on-the-job effect to the past discrimination, reactivates it in a new form, and results in present disparity and injury (*Evans*).

Viewed in this light, it is evident that the seeming anomaly suggested by United between the rights of former employees who are not rehired and former employees who are rehired simply does not exist. In both cases, one must look to the current practice being challenged, and determine whether that current practice is based upon prior discrimination. If, as in *Collins,* it is not so based, the plaintiff fails. If, as in *Evans,* the current practice *is* improperly based, the plaintiff succeeds. Thus, the cases are logically and pragmatically consistent with each other.

United's suggestion that *Evans* will discourage the rehire of former discriminatees is absurd. If anything, *Evans* would in fact have the opposite effect—for, as the point of distinction between *Collins* and *Evans* demon-

strates, it may well be held *unlawful* for an employer to *base* a refusal to rehire a former employee on the fact that said employee was a former discriminatee. (No such allegation was made by plaintiff in *Collins*, of course.)

The compatibility of *Evans* and *Collins* has just been reinforced by at least two very recent decisions within the Ninth Circuit. The same Court of Appeals which decided *Collins* recently cited *Evans* with approval for the proposition that current seniority preferences "perpetrate [sic] the effects of past discriminatory practices [there, in hiring] and constituted a present violation of Title VII". *Gibson* v. *I.L.W.U., Local 40,* ..... F.2d ....., 13 FEP Cases 997, 1004, n. 20 (9th Cir., 1976).

This development was noted by Judge Orrick in *Kennan* v. *Pan American World Airways, Inc.,* ..... F.Supp. ....., 13 FEP Cases 1530 (N.D. Cal., 1976), a case virtually identical to *Evans*. There, rehired female flight attendants challenged Pan Am's continuing failure to credit them with seniority, based upon prior discriminatory forced separations pursuant to that airline's former no-pregnancy rule for stewardesses. In denying Pan Am's motion to dismiss for failure to file EEOC charges within 90 days of the prior terminations the Court reasoned that "*Collins* and *Evans* are quite reconcilable":

> "Whereas an employee's so-called 'continuing nonemployment' (*Collins*) is merely a mechanical consequence or 'effect' of the original forced resignation, an employer's act of reemployment without retroactive seniority (*Evans*) constitutes, in part at least, an affirmative perpetuation of, an act in essence based upon, the original discriminatory termination. Thus, it is quite consistent to hold an

> employer legally accountable for the latter, but not the former, where suit on the original discriminatory termination is barred as untimely." (13 FEP Cases at 1533)
>
> • • •
>
> "In the instant case, the valuable statute of limitations policy of guarding against stale complaints is barely threatened. Here we have original discriminatory acts of forced resignation pursuant to a blanket, facially discriminatory policy of terminating pregnant women. There are few, if any, individual circumstances which might require proof at trial; in fact, at oral argument, defense counsel was unable to describe any 'statute of limitations'—related prejudice that might accrue. Because there is little or no visible prejudice to Pan Am by virtue of the lapse of time since its original act of discrimination, defendant's need for statute of limitations protection is minimized here. Moreover, the fact of reinstatement without back seniority and not the original termination is the focus of this lawsuit—the original discrimination has been perpetuated in a new form. Again, this is the critical difference between the instant case and *Collins,* where the purported 'continuing act' of discrimination was but a shadow or functional equivalent of the original act. Seniority is, in its very nature, a future-oriented, perpetuating, continuing structure—one which pervades and controls the realm of future benefits. The *Collins* 'event' of 'continuing nonemployment', on the other hand, points entirely to the past event of forced resignation.
>
> Thus, while the importance of the statute of limitations policy is quite curtailed here, the weight of Title VII's substantive policy is maximized." (13 FEP Cases at 1534).

Interestingly, as to the suggestion that *Evans* and *Collins* might create an anomaly between the rights of rehired

and not rehired former discriminatees, which we have shown to be without substance, Judge Orrick reasoned:

> "However, if such a risk is built into the *Evans-Collins* result, and even if such a risk is more real than hypothetical, the Court concludes that such a risk is worth the legal result." (13 FEP Cases at 1534).

V.

The Court Of Appeals' Decision Is Entirely Consistent With This Court's Reasoning In Franks v. Bowman.

United has taken the position that, since *Franks* was, strictly speaking, a remedy case and did not involve time limits, it was wrong for the Court of Appeals to take guidance from this Court's reasoning therein. United misconceives the application of *Franks* because of its misconception of the issue in *Evans*. Because the question here is not whether the charge was timely, but is, rather, *whether the challenged seniority practice is illegal*, the reasoning this Court followed in *Franks* bears directly on the issue at bar.

In order to show that the Court of Appeals' analysis was wrong, United has to establish that the challenged seniority practice, even though it creates a current disparity and perpetuates the effects of past discrimination, is not legally subject to Mrs. Evans' line of attack under Title VII. Since this case arises on a motion to dismiss and Mrs. Evans has advanced a clear theory of relief, there are two possible ways (in addition to the policy arguments dealt with hereinabove) in which United could logically have defended: (1) by using case law to demonstrate the lack of support for Mrs. Evans' legal theory and the inapplicability of the cases she ad-

duces in her behalf, and/or (2) by seeking to rely upon a statutory protection, as the Court of Appeals recognized. United's defense has, instead, largely been one of avoidance. It has not, for the most part, questioned the applicability of the massive pertinent case law. It has renounced reliance on Section 703(h) of the Act, and persists in adducing inapposite cases for the mutually agreed-upon proposition that, *if* Carolyn Evans were simply and solely attacking the 1968 termination, *then* her charge would have been untimely. What United fails to realize is that, in order for that argument to succeed, it has to show that its current seniority practice is immune from the attack being made upon it.

In light of the real issue presented by this case and as stated by the Court of Appeals in Part III of its final opinion, *Franks'* application herein is simple. Bowman had interposed the defense—albeit in a remedy case—that Section 703(h) immunized its seniority policy from attack, alteration, or interference under Title VII. In order to deal with that defense, this Court had to decide the nature of the substantive protection afforded by that section. It did so quite clearly:

> ". . . [I]t is apparent that the thrust of the section is directed towards defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effect of discrimination occurring *prior to the effective date of the Act.*" (424 U.S. at 761; emphasis supplied)

This being the case, it is readily apparent that if, as here, the operation of a seniority system is challenged as perpetuating the effects of discrimination occurring *after* the 1965 effective date of the Act, then Section 703(h)

of the Act does not apply and cannot "be used to interpose a legal bar to Evans' theory", as the Court of Appeals correctly concluded, and so the instant claim is cognizable under the Act. The fact, noted above, and in *Evans,* that Congress made no changes in this Section in 1972 despite preexisting case law supportive of *Evans* is further reason to conclude that the Court of Appeals' disposition of this case comports with the legislative intent behind the Act. As this Court reconfirmed in *Franks*:

> ". . . Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin. . . ." (424 U.S. at 763; emphasis supplied)

This Court said more in *Franks,* of course. It is apparent that an essential premise for the Court's conclusion, that retroactive seniority is an appropriate form of relief for the identifiable victims of past discrimination in hiring, is the realization that without such relief, the effects of that past discrimination would be continually perpetuated by the employer's seniority policy, and a current and future disparity would exist, for the employee would

> ". . . perpetually reman subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors." (96 S.Ct. at 1266)

It was in this context that the Court of Appeals examined the applicability to this case of the rationale which had been applied by the long line of cases set forth in Part II hereinabove, and so it found that "[t]he teaching of *Franks* confirms these holdings" (Appendix, at

40). Moreover, the legislative history which this Court heeded in *Franks* is equally applicable here.

Mrs. Evans does not seek to dismantle United's seniority *system*—she merely wishes the inequity produced by United's practice in its application to her to be removed, so that she may assume her rightful place within that system. We note, too, that the concern addressed in the dissenting opinions of this Court in *Franks*—as to the effect on other employees of "competitive seniority" (as opposed to "benefit seniority") relief—is not presented by *Evans* at this time and is thus not ripe for review. In any event, the practical ramifications of a single aspect of the relief sought should not in all fairness be allowed to affect the determination as to whether or not Mrs. Evans has alleged a substantive violation of the Act sufficient to withstand United's motion to dismiss. The district court has ample latitude to fashion appropriate relief—in the form of monetary, seniority, or other relief. In the final analysis, of course, the potential concerns of other employees and of unions in the seniority area, referred to in the opposing briefs, cannot bar Mrs. Evans' claim, since that is a pure remedy issue which this Court clearly settled in *Franks.*[13]

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[13] We note, too, that the relief sought for Mrs. Evans will affect but one out of the thousands of flight attendants employed by United. Whether others like her exist, and the nature of the precise relief to be afforded in this case, are questions for the trial court to decide.

CONCLUSION

For all of the foregoing reasons, Carolyn Evans respectfully urges that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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Dated: January 13, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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SUBJECT INDEX.

Table of Authorities.

Cases.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333.

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

In reply to the brief of Evans we shall discuss the arguments raised therein. Five arguments are set forth. United shall deal with them in the order in which they are stated.

I.

EVANS' ARGUMENT THAT THE TIME LIMIT OF SECTION 706(d) WAS SATISFIED IN THIS CASE.

Evans concedes in her brief that timely filing of an EEOC charge is a jurisdictional prerequisite to suit. She also concedes that if she were attacking her 1968 termination, rather than a current employment practice, her claim would be time-barred. As stated by Evans in her brief (p. 14):

> "From the very outset of this case, Mrs. Evans has conceded both that the timely filing of an EEOC charge is a

> jurisdictional prerequisite to suit, and that, were she simply and solely attacking her 1968 termination, rather than a current employment practice, her claim would be time barred. * * *"

Evans maintains, however, that she is not attacking her 1968 termination, but is only attacking United's current and continuing seniority practice with respect to her. As she puts it (Evans' br., p. 10):

> "The 'employment practice' here being challenged is United's seniority practice with respect to Mrs. Evans. That practice is clearly current and continuing. It was occurring within 180 days of the day she filed her charge; indeed, it was occurring on the very day she filed her charge. She was injured by it then, is injured by it today, and will be injured by it in the future: . . ."

The specific employment "practice" which Evans claims to be ongoing discrimination against her concerns her placement into the seniority system. She maintains that when she was rehired in 1972, she should have had reinstated to her the seniority date reflecting the period she previously served in United's employ from 1966 to 1968, rather than a seniority date reflecting her status as a new hire in 1972. It is the loss of this prior seniority and the use by United of the new 1972 seniority date for her flight assignments, vacations, etc. which Evans' claims constitutes "continuing" discrimination against her. Since, according to Evans, "continuous discrimination" is present, the statutory time limitation is satisfied by the filing of an EEOC charge at any time during the period such discrimination is in effect. And since this "continuous discrimination" was allegedly in effect in 1973, when Evans first filed her EEOC charge, Evans argues that she satisfied the Section 706 time requirement.

If the underlying assumption in Evans' argument were correct; *i.e.*, if the seniority placement given her in 1972 and its subsequent utilization by United in making flight assignments, etc., constitute separate, discrete, acts of discrimination in themselves within the meaning of Title VII, then Evans' position would be

correct. The error in Evans' position, however, lies in the fact that the seniority she requests is seniority derived solely from her prior employment and her right to reinstatement of that seniority is barred by her failure to file a timely charge in 1968 protesting the loss thereof.

Since Evans concedes that if she were attacking her 1968 termination of employment in its entirety, her attack would be time-barred, she must logically concede that an attack on part of her 1968 termination is also time-barred. At the time of her resignation in 1968, all aspects of Evans' employment terminated, including pay, vacations, travel benefits, etc., as well as seniority. Evans and *Amicus* NAACP admit that she has no rights to back pay lost as a result of her 1968 termination (Evans' br. p. 27; *Amicus* NAACP br. pp. 1-2), but she inconsistently claims she currently has rights to the seniority which she lost as part of that same termination. If her failure to file an EEOC charge within 90 days of her 1968 termination bars her right to reinstatement and back pay—as Evans and the NAACP admit—then surely this same failure bars her right to her pre-1968 seniority.

No "new" act of discrimination occurred in 1972 or thereafter with respect to Evans. The seniority she seeks is inextricably tied to her prior employment. Evans recognized this in her initial Complaint filed in the district court, wherein she stated (Appendix, p. 7):

> "Plaintiff complained of and does complain of the fact that United maintained a policy and practice of terminating females, but not males, from their flight personnel (stewardess) positions upon marriage or contemplation of marriage; that plaintiff was forced to resign her position as a stewardess pursuant to this policy; that United refused to reinstate plaintiff; and that, when United did later rehire plaintiff, it refused and continues to refuse to credit plaintiff with all her former seniority."

Evans could not state more clearly that she is asking for the seniority she lost when terminated because of the no-marriage

rule in 1968. But as the *Amicus* NAACP concedes in its brief (p. 2):

> ". . . she [Evans] is forever barred from obtaining the full Title VII relief to which she would otherwise have been entitled solely as a remedy for that unlawful act.* * *"

Apart from her 1966-68 period of employment, Evans had no rights to "extra" or restored seniority when rehired as a new employee in 1972. All rights to that former seniority were barred forever ninety days after her termination in 1968. She may not properly claim such seniority now.

II.

EVANS' ARGUMENT THAT UNITED'S CURRENT SENIORITY PRACTICE IS UNLAWFUL AS APPLIED TO HER BECAUSE IT IS BASED ON, AND PERPETUATES THE EFFECTS OF, PRIOR DISCRIMINATION.

United's seniority system is neutral in every respect. All employees in the system have the same rights regardless of sex, race, color, religion, or national origin. Seniority begins with employment and ends when employment ends. The system is a fundamental system utilized by numerous employers for the purpose of distributing benefits and assignments based on continuous length of service.

Evans makes it clear in her brief that she is not attacking United's seniority system, but rather is attacking her placement within the system. Thus, in her brief, Evans states (p. 41):

> "Mrs. Evans does not seek to dismantle United's seniority system—she merely wishes the inequity produced by United's practice in its application to her to be removed, so that she may assume her rightful place within that system.* * *"

Since Evans is not attacking United's seniority system, it is evident that the "employment practice" which she is attacking arises from United's policy of placing *all* new hires, including

Evans, in the seniority system with new date of hire seniority and of not according rehired former employees "special treatment" by granting them extra seniority reflecting their prior period of employment.

There is, of course, no dispute that United treats all new hires equally, and without regard to race, sex, color, etc. It is this very policy of equal treatment which Evans complains about. She is asking for more seniority than that given all other new hires in her 1972 class. Her concern would be justified if she had a *right* to extra or restored seniority, but, as noted previously, all rights which Evans had to her former seniority were barred in 1968. Accordingly, Evans was properly given new-hire seniority in 1972, the same as all other new hires.

As *Amici* airlines have correctly pointed out in their brief (p. 10), the only current "policy" of United which Evans is challenging here is United's failure to have a policy of reinstating the possible victims of alleged past discrimination (such as Evans) to their former positions. But there is no requirement in Title VII that United have such a policy. Reinstatement of rights is a required remedy for acts of discrimination timely protested with an EEOC charge. It is not a required remedy when the claim to such rights has been barred.

Evans argues, however, that since she is currently suffering the effects of the loss of her 1966-68 seniority, she is a victim of a current and continuing violation of Title VII. Further, that if the principle of continuing wrongs is not applied in her case, then it cannot logically be applied at all. Evans notes that the legislative history accompanying the 1972 amendments to the Act specifically intended to preserve court decisions pertaining to continuing violations (Evans' br., p. 12).

United, of course, does not dispute the fact that there are certain types of violations of Title VII which the courts have held to be "continuing" in nature. Discharge cases, however, are not among them. As this Court recently held in *International U. of Elec. Wkrs.* v. *Robbins & Myers,* ..... U. S. ....., 97 S. Ct.

441, 446 (1976), a discharge under Title VII is a "final" unlawful employment practice at the time the affected individual "stopped work and ceased receiving pay and benefits." *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975) and other cases cited by United in its initial brief in this case represent similar authority.

Evans would have this Court believe that the doctrine enunciated in *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971) and in the line of decisions involving departmental seniority systems, such as *Local 189, United Papermakers* v. *U. S.*, 416 F. 2d 980 (5th Cir. 1969), *cert. den.* 397 U. S. 919 (1970) is in jeopardy. This is not so. There is no inconsistency between the decision in *Griggs* or in such cases as *United Papermakers* and the enforcement in *Evans* of the time limits established and reaffirmed by Congress. Nor would the barring of Evans' claim disturb the true principle of continuing discrimination that has developed under Title VII.

Let us first consider this Court's decision in *Griggs* v. *Duke Power Co., supra.* Unlike *Evans,* the testing and educational requirements struck down in *Griggs* were requirements which were themselves discriminatory and which the plaintiffs sought to have abolished. As discussed previously, Evans does not assert that United's seniority system is in itself discriminatory, nor does she seek to dismantle or abolish it in any way—she simply seeks to be "reinstated" in it to her former position. *Griggs* does not represent the proposition that an employment policy or seniority system must affirmatively rectify an otherwise time-barred claim of discrimination or grant special treatment to alleged victims of past discrimination.

In addition, *Griggs* involved clear disparate results between black and white employees in their ability to successfully qualify under the testing and educational requirements. There are no such disparate results between males and females under United's seniority system. Date-of-hire and seniority applies equally to males and females; both may leave the company or be terminated and both would receive new date-of-hire seniority if reemployed. Although Evans refers to the fact that because of her termination in 1968 she finds herself with less seniority than some males, the fact is that she also has less seniority than some females. Sex is not a factor.

Moreover, and more importantly, *Griggs* involved rights of blacks not to be discriminated against in their current endeavors to gain higher rated job positions. No time bars were present. In *Evans,* on the other hand, she is seeking to have restored to her a seniority position to which she has no present right, that right having been barred some five years in the past.

Similarly, Evans' claim does not properly fall within the line of cases involving departmental seniority systems such as *Local 189, United Papermakers* v. *U. S., supra.* In an analysis of those cases and the question of whether a seniority system, although facially neutral, may be deemed to represent a continuing or present violation under Title VII, two necessary ingredients are involved:

(a) the discrimination either originated in the seniority system and/or the seniority system itself was so inexorably tied to or tainted by the prior discriminatory practice as to represent a mere extension of it; and

(b) the aggrieved party has present rights that are being violated by the seniority system.

Evans can claim neither of the above ingredients.

In *Papermakers,* as is typical in departmental seniority cases, the employer historically maintained segregated seniority lists and "lines of progression"—one for whites and one for blacks. Promotion or transfer within each line was determined by "job" or "department" seniority. As a necessary result, blacks were excluded from "white jobs." Ultimately the two lists were merged, but this was effected merely by tacking the black seniority list to the bottom of the white seniority list. The new "merged" seniority list, therefore, was itself as discriminatory as

the two old lists. For purposes of promotion or transfer to formerly all white jobs, the seniority system still did not provide black employees with seniority credit for the years spent in the black jobs and, without such recognition, black employees continued to be excluded from white jobs.

In comparing the decision in *Papermakers* and in the other so-called departmental seniority cases with *Evans*, two differences are clear. First, in the departmental seniority cases, the seniority system itself was discriminatory—both past and present. The discrimination not only originated in the seniority system itself, but the same discrimination was an integral part of the present structure of the seniority system. This is not true in *Evans*. United's seniority system had nothing whatsoever to do with her resignation from employment in 1968 nor her rehire in 1972. If Evans suffered a discrimination, it was because of the former "no-marriage" termination policy, not because of an employment seniority system that was or is in itself discriminatory.

The second distinction is the fact that, as was true in *Griggs*, the black employees in *Papermakers* had *a present right* to have their transfer requests to formerly all white jobs considered on its merits and without racial discrimination. The seniority system itself denied them this right and constituted a current discrimination. This is not true with respect to Evans. Evans had no right of reinstatement to her former employment or seniority in 1972. She possessed only the right to have her 1972 application considered on its merits along with the other applicants. Her reemployment and new date-of-hire seniority did not violate any right which Evans had in 1972 or thereafter. Clearly, even under the departmental seniority cases, an employee whose employment had been terminated in 1968, but who is subsequently rehired four years later has no claim other than to have her new application for employment fairly considered against other new employees, black or white, who compete for hire with her.

Separate mention must be made of *Acha* v. *Beame*, 531 F. 2d 648 (2d Cir. 1976), a decision heavily relied upon by Evans in her brief. In *Acha*, two plaintiffs brought an action under Title VII and under 42 U. S. C. § 1983 on behalf of themselves and other female police officers to stay their threatened layoff from the New York City police force under the "last-hired, first fired" method. The gist of their complaint was that since the threatened layoffs were based on seniority, they were necessarily sex-discriminatory in that the Police Department had not hired women as police officers until 1973 and then hiring was made from separate lists in a ratio of four men to one woman. Since so many females had been hired only recently, the "last-hired, first-fired" system affected them more than males. The district court, *sua sponte*, before any answer, motion or time limit defense had been presented by the defendant, denied plaintiffs' motion for a preliminary injunction and dismissed the complaint. *Acha* v. *Beame*, 401 F. Supp. 816 (S. D. N. Y. 1975). This dismissal was based upon the finding that the "last hired, first fired" method of layoff was part of a bona fide seniority system and that to grant relief to plaintiffs would constitute preferential treatment on the basis of sex, violating Section 703(j) of Title VII.

Noteworthy is the fact that the time limitation issue concerning the plaintiffs' failure to file a charge within the statutory limits of Section 706(e) (with regard to the previous refusals to hire because of sex) was never reached in *Acha*—either in the district court prior to appeal or on appeal. On appeal, the Second Circuit focused upon Section 703(h) and, in reversing the district court, held that an adjustment of seniority as a remedy is not precluded by Section 703(h).

Ironically, on remand, when the time limitation question under Title VII was *first raised* in *Acha*, the district court denied such defense, but based its denial upon the Seventh Circuit's ruling in *Evans* as its sole precedent. ..... F. Supp. ....., 13 FEP Cases 16, 18.

Evans has from the outset asserted and relied upon *Acha* as authority supporting the timeliness of her claim. In fact, however, the timeliness issue was only recently ruled upon in *Acha* and then decided on the basis of *Evans*. Thus, we have come full circle: Evans cites *Acha* and *Acha* cites *Evans*. The *Acha* case does not merit consideration as contrary precedent here.

Amicus NAACP notes that Congress, when amending Title VII in 1972, placed a two year limitation on back pay, and thus recognized that there are "continuing violations" of Title VII which may be subject to challenge before the EEOC and in the courts (*Amicus* NAACP br. pp. 3-5). The short answer to this observation is that there is no dispute "continuing" discriminatory employment practices are involved in certain types of cases. *Evans*, however, is not such a case. In *Evans*, the basis of her complaint involves the application of the no-marriage rule to her in 1968. That rule was terminated in November, 1968 and no continuing violation is involved. United does not take the position in this case that "continuing violations" do not exist in appropriate cases; it takes the position that *Evans* does not involve such a violation.

III.

EVANS' ARGUMENT THAT THE CASES CITED IN SUPPORT OF UNITED'S POSITION ARE INAPPOSITE.

Evans endeavors to distinguish the cases cited by United in support of its position on the basis that they either involve unrelated facts situations or "only discharges and nothing more", unlike Evans wherein a current and continuing on-the-job seniority practice has been challenged.

Without discussing again all points raised in United's initial brief, United wishes to note that the arguments raised by Evans involve distinctions without differences.

The reason United cited the cases is twofold. First, they demonstrate that timely filing of an EEOC charge is a jurisdictional prerequisite to suit. Evans concedes in her brief that this is correct (Evans' br., p. 14). Second, they show that the courts have considered such actions as discriminatory discharges, transfers and the like as completed acts, not as "continuing" violations, even though there are always some "lingering effects" of these actions. *Evans* involves a completed act.

The argument that "lingering effects" constitute new and actionable violations of Title VII in themselves was effectively rejected by this Court in an analogous case arising under the National Labor Relations Act, 29 U. S. C. § 141 *et seq.*

In *Local Lodge No. 1424, International Ass'n. of Machinists* v. *NLRB*, 362 U. S. 411 (1960), a union that did not represent a majority of a unit of employees negotiated a collective agreement covering that unit. The agreement had a clause recognizing the union as the exclusive bargaining agent and a clause requiring all unit employees to join and remain members of the union. It is an unfair labor practice to enter into such an agreement under these circumstances. No charge, however, was filed with the National Labor Relations Board within the six-month period after the commission of that wrong as required by § 10(b) of the National Labor Relations Act. Instead, 10 months after the execution of the agreement, a charge against the union was filed and was upheld by the NLRB as timely filed based upon the theory that a current or continuing violation was involved ". . . since it was 'based upon' the parties' continued *enforcement*, within the period of limitations, of the union security clause." (*Id.* at 415; emphasis in original). It was argued that even though the violation relating to execution of the agreement was time-barred, the unlawful execution of the agreement was nevertheless relevant in determining whether conduct within the 6-month period was unlawful and that evidence as to it was admissible because § 10(b) is a statute of limitations, not a rule of evidence.

The Court rejected this argument. Mr. Justice Harlan's analysis merits extensive quotation (362 U. S. at 416-417, 419; footnotes omitted):

"It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

"The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign.* * *

* * * * *

"Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships."

The distinction drawn in the *Machinists* case is applicable here. Evans' present claim is an attempt to revive a "legally defunct" act that occurred in 1968 and is properly barred by Section 706(d) of Title VII. In truth, she has no claim and does not assert that United's seniority system is, standing alone, unlawful. Instead, the only means by which Evans claims the neutral seniority system is discriminatory is with reference to an alleged act of discrimination in 1968. Rather than a seniority system that itself is discriminatory with respect to sex, it is her discharge and loss of seniority in 1968 which is the true basis and "underlying legal wrong" of her claim. The time limits in Section 706 have the same purpose in Title VII that § 10(b) has in the NLRA. The reasoning of this Court in the *Machinists* case applies to *Evans* with equal force.

As stated in our initial brief, if the broad extension of the "continuing discrimination" concept asserted in *Evans* were to receive acceptance, then *any* present employee who claims he or she was discriminated against in the past could wait indefinitely and file a charge any time in the future, as did Evans, so long as some "collateral effects" of the past act of discrimination are present. It is understandable why Evans did not respond to the examples given in our initial brief (United's br. p. 19)—they are not distinguishable and clearly illustrate that in such cases and others, any period of limitations for Title VII actions would be rendered meaningless if the *Evans* rationale were accepted. Evans recognizes this is true because she argues that defendants have the principle of laches which they may raise if appropriate (Evans' br. pp. 24-25). The principle of laches, however, was clearly not the Congressional intent since it established time limits in Section 706(d) when the Act was originally passed in 1964 and it affirmed time limits in the 1972 amendments.

IV.

EVANS' ARGUMENT THAT EVANS AND COLLINS ARE COMPATIBLE.

Evans suggests that the Ninth Circuit's decision in *Collins* v. *United*, 514 F. 2d 594 (9th Cir. 1975) is compatible with the decision in *Evans*. She ignores the fact that the majority of the Seventh Circuit did not agree with her in their initial decision in *Evans*, 12 FEP cases 288, 290 (7th Cir. 1976) (Appendix, at 25-26):

> "Evans would have this Court find a present discrimination when the adverse effect of a past discrimination is still felt because of a current policy of the employer, even though such current policy is not discriminatory with respect to sex. This is congruent with the thesis that the Ninth Circuit specifically declined to accept in *Collins* when it stated that 'the alleged unlawful act or practice—not merely, its effects—. . . must have occurred within [the statutory period] preceding the filing of charges before the EEOC."

The Seventh Circuit reversed its initial decision *only* because of its interpretation of this Court's ruling in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), *not* because it felt that the decision in *Collins* was compatible with its revised ruling. In fact, reference to and discussion of the decision in *Collins* is conspicuously absent from the Seventh Circuit's second decision in *Evans*, 534 F. 2d 1247 (1976). (Appendix, at 33-40).

Evans suggests that United, in likening *Collins* to *Evans*, "has confused the mere passive effects of past discrimination with a so-called present act in *Evans* (Evans' br. p. 35). In truth, the only difference between the *Collins* and *Evans* cases is the fact that Evans was reemployed in 1972 whereas Collins was not. Clearly, the act of reemployment was not discriminatory, nor was the routine act of conferring new date-of-hire seniority upon her, as upon any other rehire. Like Collins,

Evans had no right to reinstatement. Evans, however, once rehired, claims that she is necessarily entitled to the seniority benefits of reinstatement, even though she concedes she is barred from obtaining other benefits related to her prior employment. There is no escaping the anomaly, under Evans' theory, that any employee who is rehired may avoid the limitation period as to the prior discharge, while the employee who is not rehired is bound by it.

Evans in her brief cites two recent decisions within the Ninth Circuit as authority for the proposition that *Evans* and *Collins* are compatible (Evans' br. p. 36). In the first case, *Gibson* v. *Local 40, Supercargoers & Checkers, etc.*, 543 F. 2d 1259 (9th Cir., 1976), the "underlying legal wrong" was the exclusion of blacks from employment or referral as "casual clerks." This racial discrimination was "perpetuated" both in the lack of hiring or nonplacement of blacks on the "casual clerk" seniority list and in the removal and ultimate exclusion of blacks from this list. The *Gibson* case is distinguishable not only by the fact that blacks were excluded from the seniority list itself but, unlike *Evans* and *Collins*, a charge of discrimination was filed by Gibson within the statutory period after his application for employment or referral as a "casual clerk" was not accepted.[1] There simply was no time limitation issue in *Gibson* as there is in *Evans* and was in *Collins*.

The *Kennan* v. *Pan American World Airways, Inc.*, 13 FEP Cases 1530 (N. D. Cal. 1976), decision also cited by

1. Since there was no time limitation issue in *Gibson*, the Ninth Circuit's opinion does not indicate specifically when Booker Gibson first filed his charge with the EEOC. It is clear, however, that Mr. Gibson applied for employment as a casual clerk in October, 1967, and filed his charge the same month since the opinion states:

> "Five blacks were added to the group referred for casual employment in October and November of 1967 . . . It is uncontradicted that the first black, appellant Gibson, was accepted for referral as a casual clerk only after he filed a complaint with the EEOC. The four other blacks were added to the group referred for casual employment shortly thereafter." (*Id.* at 1266.)

Evans is no authority for *Evans* since it simply follows *Evans*, but notes the conflict between *Collins* and *Evans*.

V.

EVANS' ARGUMENT THAT THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S REASONING IN FRANKS v. BOWMAN.

The final suggestion of Evans and the one followed by the Seventh Circuit in reversing its decision after this Court decided *Franks* v. *Bowman Transportation Co., supra,* is that United must show ". . . that Section 703(h) immunized its seniority policy from attack, alteration or interference under Title VII" (Evans' br. p. 39). In *Franks,* this Court held that Section 703(h) insulates "an otherwise *bona fide* seniority system from a challenge that it amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination" (424 U. S. at 781). Since Section 703(h) immunizes *bona fide* seniority systems only for pre-Act discrimination, Evans then appears to argue that this necessarily means that if a post-Title VII act of discrimination is alleged and if a *bona fide* seniority system does not rectify the effects of that past act of discrimination, then the seniority practice is unlawful and a continuing violation is present. As a result, any time limits applicable to that past act of discrimination are no longer relevant.

This, of course, was not the holding in *Franks* and this reasoning would convert *Franks* from a recognition of the Congressional objectives in Sections 703(h) and 706(g) not to prohibit "make whole" relief, including "rightful placement" in a *bona fide* seniority system, *when timely claims* of *post-Act discrimination are presented* into a complete abolishment of time limits for claims of post-Act discrimination (regardless of when the post-Act discrimination occurred) if that act ad-

versely affected seniority and an adjustment of seniority is sought as a remedy.[2]

In *Franks,* post-Act discrimination was involved and a seniority remedy was sought. But rather than holding that a *bona fide* seniority practice becomes unlawful because it does not grant retroactive seniority, as Evans would suggest, this Court properly looked to the "underlying legal wrong" and observed that:

> "The underlying legal wrong affecting them [plaintiffs] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire." (*id.* at 758.)

Here, the "underlying legal wrong" about which Evans complains is not United's seniority system. Evans does not ask to modify or eliminate the existing seniority system as unlawful or based upon sex discrimination. Instead, she seeks a seniority remedy for her alleged discriminatory termination in 1968. In *Franks,* there was no contention before this Court that timely charges in connection with the "underlying legal wrong" had not been filed within the statutory period. In the absence of a time limitation question, this Court held that section 703(h) did not bar the grant of retroactive seniority to provide appropriate "make whole" relief for that "underlying legal wrong." Evans' "underlying legal wrong," on the other hand, occurred five years before she filed any charge of alleged discrimination and her claim, necessarily based on that act of discrimination, is time-barred. The decision in *Franks* does not authorize "unbarring" of her claim.

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2. As stated in the brief *amici curiae* of the Equal Employment Advisory Council, Airline Industrial Relations Conference, and Air Transport Association (p. 15):

> "By reviving Evans' long-barred claim of prior illegal termination by means of calling the routine operation of a *bona fide* system an unlawful 'perpetuation' of that previous discrimination, *Evans* II has converted the availability of a *remedy* into the substance of a *wrong*."

CONCLUSION.

For the foregoing reasons, it is respectfully urged that this Court should reverse the decision of the Seventh Circuit Court of Appeals and affirm the judgment of the District Court previously entered.

Respectfully submitted,

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No. 76-333

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UNITED AIR LINES, INC.,

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CAROLYN J. EVANS,

Respondent.

On Writ of Certiorari to The United States Court of Appeals For The Seventh Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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3 3

INDEX

CITATIONS

CASES:

Supreme Court of the United States

October Term, 1976

No. 76-333

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO hereby respectfully moves for leave to file the attached brief *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. The purpose of that brief is to call to the Court's attention *Machinists Local* v. *Labor Board,* 362 U.S. 411, a case which states the principle that governs this case but which has not been cited by the petitioner. Counsel for petitioner have consented to the filing of the AFL-CIO's brief *amicus curiae,* but counsel for respondent has declined to do so.

INTEREST OF THE AMICUS CURIAE

The AFL-CIO is a federation of 109 national and interna-

tional unions having a total membership of approximately 14,000,000 men and women. This case is one of three in which review has been granted which bring to this Court for the first time the doctrine developed by the lower courts "that a facially neutral seniority policy may be in violation of Title VII [of the Civil Rights Act of 1964] if its effect is to perpetuate the disadvantages accruing from prior discrimination." (A. 39-40.) (See also *International Brotherhood of Teamsters, et al.* v. *United States, et al.*, Nos. 75-636 and 75-672, and *Teamsters Local Union 657, et al.* v. *Rodriguez, et al.*, Nos. 75-651, 715 and 75-718.

We believe that this "perpetuation" doctrine is wrong. Our reasons are set out in full in the accompanying brief *amicus curiae*. Our interest in presenting those reasons to the Court is two-fold:

First, as we emphasized last Term in our brief in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, it is our view that individuals discriminated against in hire, assignment or discharge because of their race or sex, like individuals discriminated against because of their union membership, should receive a remedy that makes them whole and that therefore includes restoration to the seniority position that they would have had but for the discrimination. But, we also believe that under Title VII as under the National Labor Relations Act that remedy should be accorded only to those who file their claims within the limitations period stated in the applicable statute. For the reasons stated by this Court in *Franks*, it is just and equitable to place the discriminatee who moves to vindicate his rights promptly in his "rightful place" in the seniority system. But the costs to the employees who lose comparative seniority

should not be understated. As this Court noted in *Franks*: "More than any other provision of the collective [bargaining] agreement • • • seniority affects the economic security of the individual employee covered by its terms." (*Id.* at 766.) There is a time at which the "economic security of the individual employees" hired subsequent to an employer's discrimination against others should no longer be subject to question. That point is fixed by the statute of limitations whose chief purpose is repose. As this case shows, the principal vice of the perpetuation doctrine is that the statute of limitations on the original act of discrimination (or alleged act of discrimination) never runs.

Second, the perpetuation doctrine also means that a labor organization that enters into a collective agreement with an employer that contains a seniority system lawful in itself is held to violate Title VII by reason of the employer's unilateral discrimination in hire, assignment, or discharge. For, under that doctrine there is a duty on the union running into the indefinite future to place employees, who claim they were discriminated against in hire, assignment or discharge, but who do not perfect that claim, in the seniority slots they would have occupied if the employer had not discriminated or if the employee had through Title VII directly and successfully attacked that discrimination. Thus, although it is the combination of the employer's discrimination and the putative discriminatee's failure to utilize the procedures provided by the Act to remedy that discrimination which results in the continued adverse effects complained of, the perpetuation theory makes the union liable with the employer. There is nothing in the logic, language or legislative history of Title VII which supports that entirely unfair result.

ISSUE TO BE COVERED IN THE BRIEF AMICUS CURIAE

The burden of the argument developed in the accompanying brief *amicus curiae* is that the governing precedent here is *Machinists Local* v. *Labor Board*, 362 U.S. 411 (*"Machinists"*). In *Machinists*, a National Labor Relations Act case, Mr. Justice Harlan held:

> [W]here conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice • • • the use of the earlier unfair labor practice is not merely 'evidentiary', since it does not simply lay bare a putative current unfair labor practice. Rather it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. (*Id.* at 416-417.)

The *Machinists* decision did not at all turn on any peculiarity of the unfair labor practice there charged. Indeed, one of the prior decisions of the NLRB to which Justice Harlan referred as stating the correct rule involved a layoff lawful in itself but traceable to an earlier unlawful reduction in seniority where, as here, the employee did not file a timely charge against the original act of discrimination. (See *Bowen Products C orp.*, 113 NLRB 731, discussed at 362 U.S. at 419-420.)

As we demonstrate in our argument, the *Machinists* case is this case. For here too the claim is necessarily predicated upon the alleged illegality of a time-barred act, Mrs. Evans termination under United's no-marriage policy. This is clear from Mrs. Evans' own statement of position in this

Court. (Respondent's Brief in Opposition, pp. 2-3, 19-20.) Under Mrs. Evans' "perpetuation" cause of action, the use of the original termination "serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be used in effect results in reviving a legally defunct [unlawful employment practice]." (Cf. 362 U.S. at 417.)

A decisive consideration in *Machinists* was that if a present violation of the Act can be found where it is inescapably grounded upon a prior time-barred violation, the statute of limitations will never run on that prior act, thereby defeating the purpose of the statute of limitations. Here, too, it is clear, from Mrs. Evans' own statement of her position, that, on her view, § 706(d), Title VII's limitations provision, would never run on her original termination. The rule of *Machinists*, and its application to Mrs. Evans' present claim, is therefore essential to avoid the "anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions." (*Campbell* v. *City of Haverhill*, 155 U.S. 610, 616.)

CONCLUSION

For the foregoing reasons, this motion by the American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* in order to call to the Court's attention *Machinists Local* v. *Labor Board*, 362 U.S. 411, a case which states the principle that governs this case but which has not been cited by the petitioner, should be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

v.

CAROLYN J. EVANS,

Respondent.

On Writ of Certiorari to The United States Court of Appeals For The Seventh Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) contingent upon the granting of the foregoing motion by the AFL-CIO for leave to file a brief *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The chain of events that led to this lawsuit predicated on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.*, begins with United's February 1968 termination of Mrs. Evans' employment as a stewardess. In the February 1973 charge she filed with the

Equal Employment Opportunity Commission, and in the complaint she later filed here, Mrs. Evans alleges first that the termination was the product of sex discrimination and thus an unlawful employment practice under § 703(a)(1) of Title VII,[1] and second that United's application to her, commencing with her February 1972 hire, of the Company's present seniority rule whereby employees are credited with continuous-time-in-service rather than all-time-in-service for purposes of allocating certain job benefits is an additional unlawful employment practice.[2]

Mrs. Evans' second cause of action does not proceed on the theory that the continuous-time-in-service rule discrim-

[1] Section 703(a) provides in its entirety:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[2] The events which precipitated this holding were succinctly stated in the opinion below:

> This suit was brought by Carolyn J. Evans, under Title VII of the Civil Rights Act of 1964, to recover seniority and back pay that she allegedly lost because of her separation from employment with United Air Lines. The complaint claims that United discriminated against Evans in February, 1968, when United, by reason of Evans' marriage, forced her to resign her employment as a stewardess. She also asserts, however, a continuing discrimination against her as a result of the current application of United's seniority policies, which consider only continuous time-in-service and thereby perpetuate the adverse effects of the original discriminatory discharge.
>
> • • • On November 7, 1968, United discontinued its policy of requiring stewardesses to remain unmarried, and on February 16, 1972, Evans was again hired as a new employee of United.
>
> • • • Evans filed a charge of discrimination with the EEOC on February 21, 1973—five years after her termination from employment, and more than four years after United eliminated its no-marriage rule. She had not filed any prior charge of discrimination with the EEOC, or with any other government agency, or in any way challenged United's no-marriage rule.
>
> • • • United • • • moved to dismiss the complaint on the ground that Evans had failed to file a charge with the EEOC within ninety days of the alleged unlawful practice, which occurred in February 1968, United claimed, when Evans was forced to resign as a stewardess and her employment and seniority were terminated. • • •
>
> The district court granted United's motion to dismiss the complaint • • •. (A.33-35; footnotes omitted.)

United's "no marriage" rule has been declared an unlawful employment practice. (*Sprogis* v. *United Air Lines*, 444 F.2d 1194 (C.A. 7), *cert. denied* 404 U.S. 991.)

inates against women generally. Indeed, the Court of Appeals expressly recognized that the rule "would appear to be neutral • • • as between male and female employees." (A. 36, n.6.) Rather, as that court noted, Mrs. Evans "claims that a current employment practice or policy, though facially neutral, is unlawful if by its operation it enables prior discrimination to reach into the present, and thus prolongs the effect of such discrimination." (A. 35.) And, as the court below recognized, that claim invokes the "perpetuation" doctrine developed by the lower courts, *viz*, "that a facially neutral seniority policy may be in violation of Title VII if its effect is to perpetuate the dis-

advantages occurring from prior discrimination." (A. 40; footnote omitted.) Thus, to prevail on her second claim as on her first, Mrs. Evans must establish that her 1968 termination was discriminatory. This identity between the two is made manifest in the lower court's opinion:

> It is apparent that United's continuous-time-in-service seniority program may put an employee who has been discharged and later rehired into an inferior seniority position than would have been the case if the employees had not been discharged and, thereby, perpetuates some of the disadvantages resulting from the prior discharge. *If* the prior discharge was itself a discriminatory one, *then* United's seniority policy is an instrument that extends the impact of past discrimination, albeit unintentionally. *Consequently*, the present application of United's seniority policy is deemed to be discriminatory. (A. 39; emphasis added.)

United's response is that Mrs. Evans' claims are time-barred by § 706(d) which provides that an EEOC charge, the timely filing of which is "specifie[d]" by the Act as a "jurisdictional prerequisite that an individual must satisfy before he is entitled to institute a lawsuit" (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47), "shall be filed within ninety days after the unlawful employment practice occurred."[3]

[3] The limitations provision of the 1964 Civil Rights Act, which was in effect when Mrs. Evans was terminated, was denominated § 706(d). In 1972 the limitations provision was amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, (the "1972 EEO Act"), and at the same time was redenominated § 706(e); the new § 706(d) deals with a different subject. To avoid confusion throughout this brief, by "§ 706(d)" we shall always mean the limitations provision be it that of the 1964 Act, the 1972 Act, or both, as the context requires. The original § 706(d) provided as follows:

> A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The major substantive change effected in 1972 is that the 90-day period for filing charges in the first clause is enlarged to 180 days.

2. Before directing our attention to the impact of Title VII's limitation provision here, it facilitates analysis, we believe, to consider the law applicable to this controversy had Mrs. Evans filed a concededly timely EEOC charge directly challenging her termination.

Section 703(a)(1), of course, expressly provides the predicate for such a challenge. That section states that it "shall be an unlawful employment practice for an employer • • • to discharge any individual • • • because of such individual's • • • sex." Section 706(g), the Act's remedy provision, in turn, "empower[s]" the federal courts upon finding a § 703 violation, to "mak[e] whole insofar as possible the victims of [the unlawful] discrimination." (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 ("*Franks*").) And, in *Franks* this Court concluded that "It can hardly be questioned that ordinarily • • • a seniority remedy slotting the victim in that position in the seniority system that would have been [hers but for the discrimina-

tion] will be necessary to achieve the 'make whole' purposes of the Act." (*Id.* at 765-766.) Thus, § 703(a)(1)'s prohibition against discrimination in hire, discharge, and assignment, and § 706(g)'s grant to the courts of the authority to fashion "make whole" remedies provide complete assurance that the complainant will "obtain his rightful place in the hierarchy of seniority according to which • • • employment benefits are distributed." (*Id.* at 768.)

That assurance is not a fortuity; it is inherent in the nature of seniority systems. The essence of the "seniority principles • • • increasingly used to allocate entitlements to scarce benefits among competing employees ('competitive status' seniority) and to compute noncompetitive benefits earned under the contract of employment ('benefit' seniority)" is that time in service with the employer computed from the "company date of hire", or the "departmental date of hire" or an alternate beginning point, is the determinant of, or a factor in, allocation decisions and benefit computations. (*Id.* at 766-767.) If, as in *Franks,* departmental seniority is used, so long as the seniority rules are themselves neutral and they are applied according to their terms, every employee, without regard to color, race, religion, sex or national origin, receives full and equal credit for every day worked in that department. And, the system provides that allocation decisions are made in favor of the individual with the most credits, and that benefit decisions are also directly related to the credits accumulated. Company seniority systems and continuous-time-in-service systems, follow the same pattern, except that a different "hiring" date is utilized in making the computations. Thus, so far as we are able to understand, it is impossible to conceive of such a seniority system that produces results that

are congruent with any variable other than the neutral factor of time worked in the particular department, company, *etc.*

To be sure, as this Court recognized in *Franks,* where a seniority system applies, if the employer discriminates in *hire* (or assignment or discharge), a potential consequence is that the hiring discriminatees will be adversely affected in that they "will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to [the] benefits [allocated according to seniority] his inferiors." (*Id.* at 768.) But, since this adverse effect is the direct product of the hiring system and is therefore confined to the individuals that the particular employer has actually discriminated against in hire, as opposed to minority persons and women generally whom that employer has not discriminated against and who are therefore in their "rightful place in the hierarchy of seniority" (*id.*), the Court also recognized that the "underlying legal wrong affecting them is *not* the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system." (*Id.* at 758; emphasis added.) And, as we have stressed, the ultimate point of *Franks* is that individuals who are the victims of a "racially discriminatory hiring system" (or a racially discriminatory discharge system) who in a timely fashion directly challenge that legal wrong are also assured their "rightful" place in the seniority system.

It is therefore plain that had Mrs. Evans filed a timely charge against her termination and proved that the termination violated § 703(a)(1), she would have been entitled to reinstatement, including restoration to the seniority

position she would have had but for her termination. In order to achieve that result, it would have been unnecessary to create an artificial independent violation, the subsequent refusal to grant her such seniority, and the objectives of the statute of limitations, § 706(d), would also have been fulfilled.

The foregoing demonstrates also a dispositive difference between the problem concerning seniority systems posed in this case and the issue concerning tests confronted in *Griggs* v. *Duke Power Co.*, 401 U.S. 424. The central teaching of *Griggs* is that the "Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation." (*Id.* at 431.) By "practices • • • discriminatory in operation," the Court referred to those which "operate to exclude Negroes," or which "operate as 'built-in headwinds' for minority groups," at least where such "consequence[s] would appear directly traceable to race." (*Id.* at 430-431.) Under this standard, the test challenged in *Griggs* was found to be unlawful because, due to "the inferior education • • • Negroes have long received • • •, [their b]asic intelligence [does not] have the means of articulation to manifest itself fairly in a testing process • • • [and] whites [therefore] register far better • • • than Negroes." (*Id.* at 430.) Thus, the test *in itself* was racially congruent.

On the other hand the passage of time is neutral with respect to race and sex "in form" and "in operation." Consequently time worked for a particular employer or in a particular job category, the determining factor in allocating employment benefits in a seniority system, is not *in itself* race or sex linked. Such a link can be forged, if at all,

only when *that* employer has discriminated in hire, assignment or discharge. Title VII breaks that link directly by making such discrimination an unlawful employment practice and by providing a "rightful place" remedy to the hiring (or assignment or discharge) discriminatees. In this way Title VII guarantees that seniority systems that are neutral in form will also be neutral in operation and thus valid under *Griggs*.

To be sure, this guarantee does not apply where the individual is not entitled to a remedy for the original discrimination. But this occurs only in two situations both of which were dealt with by Congress. One is where the original hiring assignment or discharge discrimination took place before the Act's effective date; the other, exemplified by this case, is where the individual does not file a timely EEOC charge against the original discrimination. In both situations, Congress determined that the applicable seniority system may lawfully be applied according to its generally applicable terms. As to the first situation, the Act preserves then-existing seniority rights despite the adverse effect on pre-Act discriminatees. (See pp. 16-17 and 40-55 *infra*.) With respect to the second, both precedent and principle establish that a time-barred claim may not be the basis upon which present actions otherwise lawful are declared to be a wrong.

3(a) As we show in Part I of the Argument the governing precedent is *Machinists Local* v. *Labor Board*, 362 U.S. 411 (*"Machinists"*). *Machinists* arose in the context of a rule of law stated by the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, that the execution, by an employer and a minority union, of a collective agreement containing a union security clause is unlawful; the question

before this Court was whether the enforcement of such a clause, lawful standing alone, could be held to be an unfair labor practice, when the illegality of enforcement depended upon a showing that the execution had been illegal, and when no timely charge had been filed directly challenging the latter. Mr. Justice Harlan in a characteristically thoughtful and thorough opinion answered the question in the negative. He held:

> [W]here conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice • • • the use of the earlier unfair labor practice is not merely 'evidentiary', since it does not simply lay bare a putative current unfair labor practice. Rather it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. (*Id.* at 416-417.)

The *Machinists* decision did not at all turn on any peculiarity of the unfair labor practice there charged. Indeed, one of the prior decisions of the NLRB to which Justice Harlan referred as stating the correct rule involved a layoff lawful in itself but traceable to an earlier unlawful reduction in seniority where, as here, the employee did not file a timely charge against the original act of discrimination. (See *Bowen Products Corp.*, 113 NLRB 731, discussed at 362 U.S. at 419-420.) And, in *NLRB* v. *Houston Maritime Association*, 426 F.2d 584 (C.A. 5), the Fifth Circuit followed *Machinists*, to bar a complaint by a group of blacks who were denied the opportunity to register with an exclusive union referral hall. At the time of the application the union had, for non-discriminatory reasons, frozen all registration,

but the Board had found that refusal to register these individuals was unlawful because they had previously been denied the opportunity to register for racially discriminatory reasons; no timely charge alleging this earlier denial to be unlawful had been filed. Without reaching the question whether such racial discrimination would constitute an unfair labor practice, Judge Goldberg reversed the Board on the authority of *Machinists*.

> The question • • • is whether the acts of racial discrimination which occurred prior to the § 10(b) period can be used to infuse illegality into the otherwise legal pool so that its maintenance during the six-month period can form the basis of an unfair labor practice charge. The Supreme Court in [*Machinists*] unmistakably prohibited the use of time-barred acts for such a purpose. The referral list absent any discrimination was legal, and to use the time-barred acts of racial discrimination to infuse illegality into that pool is nothing more than "cloak[ing] with illegality that which was otherwise lawful," a result prohibited by § 10(b) of the National Labor Relations Act, 362 U.S. at 417. (*Id.* at 588.)

The *Machinists* case is this case. For here too the claim is necessarily predicated upon the illegality of the time-barred termination under United's no-marriage policy. This is clear from Mrs. Evan's own statement of position in this Court. (Respondent's Brief in Opposition, pp. 2-3, 19-20.) Under Mrs. Evans' theory, the use of the original termination "serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be used in effect results in reviving a legally defunct [unlawful employment practice]." (Cf. 362 U.S. at 417.)

A decisive consideration in *Machinists* was that if a pres-

ent statutory violation can be found where it is inescapably grounded upon a prior time-barred violation, limitations will never run on that prior act, thereby defeating the purpose of the statute's limitation provision. (See also *N.L.R.B.* v. *Pennwoven, Inc.*, 194 F.2d 521, 525 (C.A.3) and *N.L.R.B.* v. *Childs Co.*, 195 F.2d, 617, 621 (C.A.2) (L. Hand, J., concurring).) Here, too, it is clear, from Mrs. Evans' own statement of her position, that, on her view, § 706(d), Title VII's limitations provision, will never run on her original termination. For she contends that whenever United applies its continuous-time-in-service seniority policy to affect any condition of her employment, she may bring a new employment discrimination charge essential to which is that her original termination was illegal. (Res. Br. in Opp., pp. 2-3.)

The rule of *Machinists*, and its application to Mrs. Evans' present claim, is therefore essential to avoid the "anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions." (*Campbell* v. *City of Haverhill*, 155 U.S. 610, 616.) To hold that Mrs. Evans' claims are time-barred is in no way to depricate the importance of Title VII's anti-discrimination policy. It is the very nature of a statute of limitations that it will bar claims which would have been legitimate, and would have resulted in relief to the plaintiff, if the claim had been timely asserted. In *Machinists* Justice Harlan also recognized that the strong substantive policy of a law does not justify nullifying its limitations provision by permitting plaintiffs to establish that time-barred conduct not directly attacked was unlawful in order to convert present conduct otherwise lawful into a wrong.

> It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The 'policy of the Act' is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it • • •. (362 U.S. at 428.)

The same reasoning applies with equal force to Title VII, as this Court recognized only the other day in *Electrical Workers* v. *Robbins & Myers*, ... U.S. ....., 45 L.W. 4068. There, the Court rejected the contention of the plaintiff that tolling of the statute of limitations during the processing of a grievance under an applicable collective agreement should be permitted because "tolling would impose almost no costs • • •". (*Id.* at 4070.) Mr. Justice Rehnquist replied for the Court:

> [T]he principle answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision', *Alexander* v. *Gardner Denver Co.*, [415 U.S. 36] at 47, Congress did not leave to courts the decision as to which delays might or might not be "slight". (*Id.*, footnote omitted.)

The reasoning in *Electrical Workers* applies *a fortiorari* here where Mrs. Evan's contention would not merely toll the statute of limitation during the processing of a grievance alleging a discriminatory discharge, but prevent limitations from ever running on the allegedly discriminatory termination which forms the essential predicate of her "perpetuation" cause of action.

(b) The Court of Appeals' opinion in this case fails entirely to consider that under its decision Mrs. Evans' claim that her original termination was unlawful will never be time-barred; indeed the opinion gives no weight whatsoever to § 706(d). That court rested on 1) implications which it drew from *Franks, supra,* 424 U.S. 474; 2) its reading of the legislative history of the 1972 EEO Act; and 3) its reliance on the lower court precedents articulating the "perpetuation" doctrine which the Court of Appeals regarded as controlling. In Part II of the Argument we show that the Court of Appeals was wrong in all three respects.

First, in *Franks,* this Court held that an individual who has established in a Title VII proceeding that he has been discriminated against in violation of § 703 with respect to hire is entitled as part of the remedy granted by the court under § 706(g) to restoration of the seniority position he would have had but for the unlawful discrimination. The Court held further that § 703(h), which the *Franks* Court of Appeals had construed to bar the award of such seniority relief, does not limit the courts' remedial powers under § 706(g). Rather, § 703(h) was held to be "definitional"; "as with the other provision of § 703, subsection (h) delineates which employment pratices are illegal and thereby prohibited and which are not." (424 U.S. at 758.)

Since the Court proceeded on the premise that § 706's scope is broader than § 703's, the holding that § 706(g) authorizes a court which has found a § 703 violation to order the employer to remedy that violation by granting the discriminatee "rightful place" seniority does not, as the court below thought, lead to the conclusion that an employer's failure to grant back seniority to an individual against

whom he had previously discriminated in hire (or discharge) is an independent § 703 violation.

Second, the Court of Appeals also misread *Franks* when, in order to determine the legality of United's conduct, it relied on the legislative history of the 1972 EEO Act. For, whereas that history was relevant to the remedy issue in *Franks,* because the 1972 Act did amend § 706(g), the evolution and background of that Act throw no light on the question of what is employment discrimination under § 703, a provision which the 1972 Congress did not touch in any presently material respect.

Third, the Court of Appeals' reliance on the "perpetuation" doctrine was unjustified. Under that doctrine, which originated in *Quarles* v. *Phillip Morris, Inc.,* 279 F.Supp. 505 (E.D. Va.), the present application of a seniority system is deemed to be an unlawful employment practice if it adversely effects persons who were previously discriminated against on the basis of race or sex. *Quarles* itself involved the application of seniority rules to individuals who had been discriminated against in hire or assignment before the effective date of Title VII. Its basic theory was that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act." (*Id.* at 516.) That theory simply has no application to those who, like Mrs. Evans, claim that they were first discriminated against *after* the effective date of the Act. For, under *Franks,* such an individual cuts off the adverse consequences of an unlawful refusal to hire or an unlawful discharge by filing a timely charge, and securing his "rightful place" as a remedy for that violation. Thus, if Mrs. Evans' had filed a timely charge against her discharge under

United's "no-marriage" policy, as did Mrs. Sprogis (see *Sprogis* v. *United Airlines, supra,* she would have been entitled to receive reinstatement with back pay and seniority credit from the time of her discharge.

Additionally, the "perpetuation doctrine" is erroneous in the context in which it originally arose. It is, of course, true that *Franks* does not aid a person who was discriminated against in hire or assignment before the effective date of Title VII to obtain the seniority status that he would have had but for that discrimination, and that the "perpetuation doctrine" is indispensible for securing pre-Act discriminatees these seniority benefits. However, the decisive objection to the doctrine is that Congress deliberately determined that the Act would not alter the seniority status which pre-Act discriminatees had when the Act came into effect, but chose instead to protect the seniority status of the incumbents with whom the discriminatees were in seniority competition.

The conclusion would be compelled that Congress did intend, in *Quarles* words to "freeze" comparative seniority, even if the legislative history were silent. For, the first rule of construction is that "legislation must be considered as addressed to the future, not to the past • • • [and] a retrospective operation will not be given to a statute which interferes with antecedent rights • • • unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' " (*Green* v. *United States,* 376 U.S. 144, 160, quoting *Union Pacific R. Co.* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 199.) Plainly, a rule which requires the reduction of one employee's "competitive status seniority" (*Franks,* 424 U.S. at 766) as of the time of the Act in favor of other individuals because the latter had previously

been discriminated against is "interference with antecedent rights."

But Congress was not silent. The sponsors of the 1964 Civil Rights Act gave repeated assurances that "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." (110 Cong. Rec. 7213 (1964), quoted in *Franks,* 424 U.S. at 759. See also 110 Cong. Rec. at 7207, quoted 424 U.S. at 759-760, and the like assurances quoted *id.* at 759 n.15, and 760-761 n.16.) To make assurance double sure the Mansfield-Dirksen substitute included § 703(h) which transformed these representations into positive law as part of "defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. (*Id.* at 761.) The efforts of some lower courts to escape the consequences of § 703(h) and its history call to mind once again what this Court admonished in interpreting the 1972 EEO Act: "the plain, obvious and rational meaning of a statute is always to be preferred to any currious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." (*Chandler* v. *Roudebush,* 425 U.S. 840, 844.)

ARGUMENT

I

1. The problem—inherent in any limitations provision—of whether time-barred claims may be the basis upon which present actions otherwise lawful are declared to be a wrong is not one of first impression in this Court. It was squarely presented in *Machinists Local* v. *Labor Board,* 362 U.S. 411

(*Machinists*), a case arising under the National Labor Relations Act.

There, a union that did not represent a majority of a unit of employees, negotiated a collective agreement covering that unit which contained a clause recognizing the union as the exclusive bargaining agent and a "union seniority" clause requiring all unit employees to join and remain members of the union. (*Id.* at 412.) It is an unfair labor practice to *enter into* such an agreement under these circumstances (*id.* at 413-414), but no charge was filed with the National Labor Relations Board within the six-month period after the commission of that wrong as required by § 10(b) of the NLRA.[4] Instead, 10 months after the execution of the agreement a charge against the union was filed and was sustained by the NLRB on the following theory:

> The Board starts with the premise that a collective bargaining agreement which contains a union security clause valid on its face, but which was entered into when the Union did not have a majority status, gives rise to two independent unfair labor practices, one being the execution of the agreement, the other arising from its continued enforcement. Conceding that a complaint predicated on the *execution* of the agreement here challenged was barred by limitations, the Board contends that its complaint was nonetheless timely since

[4] Section 10(b) of the NLRA provides in pertinent part:

> Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

> it was "based upon" the parties' continued *enforcement,* within the period of limitations, of the union security clause. It is then said that even though the former was itself time-barred, the unlawful execution of the agreement was nevertheless "relevant in determining whether conduct within the 6-month period was unlawful," 119 N.L.R.B., at 504: and that evidence as to it was admissible because § 10(b) is a statute of limitations, and not a rule of evidence. (*Id.* at 415, emphasis in original.)

The unions responded by:

> contend[ing] that, standing alone, the union security clause and its enforcement were wholly innocent; that they were tainted only by virtue of the original unlawful execution of the agreement; and that since a complaint based upon that unfair labor practice was barred by limitations, that event itself could not be utilized to infuse with illegality the otherwise legal union security clause or its enforcement. They say, in short, that to apply in this situation the doctrine that § 10(b) is a statute of limitations, and not a rule of evidence, is to circumvent the purposes of the section, and that acceptance of the Board's position would mean that the statute of limitations would never run in a case of this kind. (*Id.* at 415-416.)

The Court concluded that the unions' "position represents the correct view of the matter". (*Id.* at 416.) Mr. Justice Harlan's analysis merits extensive quotation:

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first

is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign. * * *

* * *

Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation

over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships. (*Id.* at 416-417, 419; footnotes omitted.)

The *Machinists* decision did not at all turn on any peculiarity of the unfair labor practice there charged. Indeed, one of the prior decisions of the NLRB to which Justice Harlan referred as stating the correct rule involved a layoff lawful in itself but traceable to an earlier unlawful reduction in seniority where, as here, the employee did not file a timely charge against the original act of discrimination. (See *Bowen Products Corp.*, 113 NLRB 731, discussed at 362 U.S. at 419-420.)[5] And, in *NLRB* v. *Houston Maritime Association*, 426 F.2d 584 (C.A. 5), the Fifth Circuit followed *Machinists* in circumstances nearly identical to the present.

The *Houston Maritime* case involved the operation of an exclusive hiring hall by Local 1351 of the International Longshoremen's Association. Beginning in the summer of

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[5] The *Machinists'* opinion described the *Bowen* case as follows:

In *Bowen Products* an employee recalled from layoff was discriminatorily placed at the bottom of the relevant seniority list. He unsuccessfully attempted to obtain his proper seniority rating, and several months later was included in an economic reduction in force. Had his seniority originally been properly computed, he would not have been laid off at that time. The charge was filed and served within six months of the layoff, but more than six months after the original determination of seniority statu Finding that the only basis for a holding of unlawful layoff would be a finding that determination had been a violation of the Act, the Board dismissed the complaint. (*Id.* at 420, n. 12).

1963, five blacks, the charging parties, made attempts to register for union referral. Their early attempts were unsuccessful because union policy forbade the registration of blacks. On September 3, 1963, the union instituted a new "temporary overload policy" designed to correct the disorganized and unmanaged condition of its referral roster. The effect of this policy was that no applicants, black or white, were accepted for registration. Only those who had registered prior to September 3, 1963 were referred through the hiring hall until July, 1965, when the temporary overload policy was terminated and a racially non-discriminatory merit system was instituted. In 1964, while this temporary overload policy was in effect, the charging parties and others went to the hiring hall but were informed on each occasion that they could not register. Finally, on March 11, 1965, Leon Phelps filed a charge with the NLRB against the union after the union's president told him when he again attempted to register that they were still working on the union policy regarding registration.

The Board issued a complaint based on the assumption that a racially discriminatory refusal to refer from an exclusive hiring hall violated §§ 8(b)(2) and 8(b)(1)(A) and implicated the employer in a violation of §§ 8(a)(3) and 8(a)(1). The Court of Appeals found it unnecessary to pass on that interpretation of the unfair labor practice provisions of the Act. It rejected, for lack of substantial evidence on the record as a whole the Board's determination that the refusal to register the charging parties when they applied in late 1964 and 1965 was racially motivated. And, that Court also rejected, on the authority of *Machinists*, the Board's "alternative finding that racial discrimination occurred within the period due to the maintenance by the

Union of an illegal pool of workers." (426 F.2d at 588.)

Judge Goldberg stated:

> The Board's argument in this respect is that the Union created an all white pool of workers by its earlier racial discrimination and that the effect of the temporary overload policy was to maintain this illegal pool. The Board found that the maintenance of this pool during the § 10(b) period was itself an unfair labor practice even if no racially motivated refusal to register the charging parties took place within that time. Unfortunately this position is untenable in view of the Supreme Court's opinion in Local Lodge No. 1424, International Ass'n. of Machinists v. NLRB, 1960, 362 U.S. 411. (*Id.*)

He then quoted the paragraph from *Machinists* beginning "It is doubtless true • • •" (set out above at pp. 19-20), and continued:

> As we understand the distinction drawn by the Court in *Local Lodge No. 1424*, it is permissible in the case before us to consider the evidence regarding the Union's prior acts of racial discrimination to shed light on the true motivation behind the refulsals to allow the the charging parties to register during the six-month period. The evidence of prior acts is therefore admissible in support of the claim that racially motivated refusals to register the charging parties occurred within the § 10(b) period. This evidence was admitted and considered for that purpose. However, when viewed in light of the record as a whole we have found it insubstantial in view of the Union's evidence, credited by the Trial Examiner, that the Union's temporary policy of refusing to register anyone was not racially motivated.
>
> The Board's alternative finding regarding the continuing illegality of the pool of workers because of the

prior acts of racial discrimination falls in the second category described by the Supreme Court in *Local Lodge No. 1424*. It is an attempt to revive a 'legally defunct' act and is barred by § 10(b). *There is no claim that an all white pool of workers is, standing alone, illegal. Rather the charge here is that racial discrimination created an all white pool, and it is the discrimination which is the basis of the unfair labor practice charge and the basis for the pool's claimed illegality. Some act of racial discrimination is therefore required in order to give the Union's referral list an illegal character.* Assuming arguendo that the discrimination here asserted would be an unfair labor practice—a point which we reluctantly decline to decide—and would therefore create an illegal pool of workers, it is nevertheless plain that absent any discrimination the Union's referral roster would be a legal pool of workers. We have found on the record as a whole that no act of racial discrimination occurred within the § 10(b) period. The question, therefore, is whether the acts of racial discrimination which occurred prior to the § 10 (b) period can be used to infuse illegality into the otherwise legal pool so that its maintenance during the six-month period can form the basis of an unfair labor practice charge. The Supreme Court in *Local Lodge No. 1424* unmistakably prohibited the use of time-barred acts for such a purpose. The referral list absent any discrimination was legal, and to use the time-barred acts of racial discrimination to infuse illegality into that pool is nothing more than 'cloak[ing] with illegality that which was otherwise lawful,' a result prohibited by § 10(b) of the National Labor Relations Act, 362 U.S. at 417. We therefore reject the Board's alternative finding that acts of racial discrimination occurred within the limitation period because of the Union's maintenance of an illegal pool of workers. (*Id.* at 588-589; emphasis added.)

2. The parallel between *Machinists* and the instant case is precise.

In *Machinists* the NLRB contended that the execution of the collective agreement containing a union security clause and the enforcement of that clause were separate unfair labor practices, and that while the former was time-barred because of the failure to file a charge within six months of the date of execution, the latter was not. This Court, as we have seen, held that if the NLRA's limitations provision was to be given its due weight, the enforcement could not be held to be an unfair labor practice because its legality or illegality depended upon the legality or illegality of the time-barred execution.

Here, Mrs. Evans contends that her original discharge, and the application to her of the Company's continuous-time-in-service seniority rule after she was rehired, are separate violations of Title VII. She concedes that the former was time-barred and rightly so, for this Court held only the other day in *Electrical Workers* v. *Robbins & Myers, Inc.* ..... U.S. ....., 45 L.W. 4068, 4069 (Dec. 20, 1976), that a discharge is a "final" unlawful employment practice at the time the affected individual "stopped work and ceased receiving pay and benefits." But she argues that the application of the seniority rule is a non-time-barred violation.

United, like the company and union in *Machinists*, replies that the current employment practice complained of—the seniority rule and its application— is wholly innocent, that the only taint to that rule and its application is the original allegedly discriminatory termination, and that since a charge against that unlawful employment practice is time-barred, that act cannot be utilized to infuse with illegality

the otherwise lawful current employment practice. And, Mrs. Evans expressly agrees, indeed insists, that the "perpetuation" violation with which she charges United "is a present act or practice, explicitly *based* on the past discrimination, which gives new on-the-job effect to the past discrimination."[5]

On the reasoning of *Machinists,* United is entitled to prevail. To paraphrase Justice Harlan's analysis, "the use of the earlier [unlawful employment practice] is not 'evidentiary,' since it does not simply lay bare a putative current [unlawful employment practice]. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be used in effect results in reviving a legally defunct [unlawful employment practice]." (Cf. 362 U.S. at 417.)

As Justice Harlan recognized, allowing the limitations bar to be lifted for the purpose of characterizing the legality of present conduct "would mean that the statute of limitations would never run" on the original completed ac-

[5] Respondent's Brief in Opposition, p. 19, emphasis in original. See also *id.* at 19-20:

> Viewed in this light, it is evident that the seeming anomaly suggested by United between the rights of former employees who are not rehired and former employees who are rehired simply does not exist. In both cases, one must look to the current practice being challenged, and determine whether that current practice is based upon prior discrimination. If, as in *Collins* [v. *United Airlines,* 514 F.2d 594 (C.A.9)] it is not so based, the plaintiff fails. If, as in *Evans,* the current practice *is* improperly based, the plaintiff succeeds. Thus, the cases were rightly decided, and are logically and pragmatically consistent with each other.

tion. (362 U.S. at 416.) See also *id.* at 425, and the opinions of Judge Goodrich for the court in *N.L.R.B.* v. *Pennwoven, Inc.,* 194 F.2d 521 (C.A. 3),[6] and the concurrence of Judge Learned Hand in *N.L.R.B. v. Childs Co.,* 195 F.2d 617 (C.A. 2).[7]

[6] If we take the position that a discriminatory failure to reinstate an employee is to be treated like a continuing tort, that employee's case will never be closed until it is finally litigated. Ten years after the event, he can still file charges that he was discriminatorily discharged and that he should be reinstated with back pay. The Board concedes that his back pay would only start from the day six months before the filing of the charges. But subject to this limitation, on the Board's argument, his claim for reinstatement and back pay will keep on so long as he lives or until he is reinstated. We do not think that such an interpretation of the statute accomplishes the legislative purposes. (*Id.* at 525.)

[7] I concur, but by an interpretation of § 10(b) of the Labor-Management Relations Act not quite the same as that of the opinion in chief. The question is as to the meaning of the words any unfair labor practice occurring more than six months prior to the filing of the charge, and, as I understand the opinion, this limitation ran against Potter only because he demanded reinstatement in, and restoration to, his original position with back pay and seniority. Had he merely asked for new employment dating from the time of his demand, it would have been an independent unfair labor practice to refuse him, although the refusal were for the original reason: *i.e.,* that the union unlawfully demanded it. *It is indeed possible so to read the words, but it seems to me that to do so defeats the purpose of the limitation, because it results in making a new unfair labor practice out of each repeated refusal of the employer to relent and retract. The necessary consequence is that the initial wrong can be made to persist indefinitely, unless the employer finally recants and the same must be also true as to the union.* (*Id.* at 621, footnote omitted, emphasis added.)

Likewise, it is clear from Mrs. Evans own statement of her position that if her view were accepted, the statute of limitations would never run on the 1968 termination:

> Carolyn Evans argued below, and the Court of Appeals accepted her position, that a "loss" has occurred and has been implemented on every day of her reemployment, continues to the present, and will continue tomorrow unless checked. For example, whenever United determines Mrs. Evans' wages, her flight assignments, her fringe benefits' and whether or not she is to be laid off or recalled, it engages in its seniority practice. Each time, United has admittedly chosen to treat the 1968 termination as a break in service, and by currently relying on that past act, it has inexorably tied that past discrimination to its present treatment of Mrs. Evans' seniority.[8]

The teaching of *Machinists* is that to avoid this "anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions" (*Campbell* v. *City of Haverhill,* 155 U.S. 610, 616),[9] a limitations

[8] Res. Br. in Opp., pp. 2-3, footnote omitted.

[9] In *Campbell,* the Court established that when Congress creates a cause of action without declaring a federal statute of limitations because "it cannot have been within the contemplation of the legislative power" that there be no limitation to the claim, the presumption must be that Congress intended the state statues of limiations governing actions of a similar nature to apply. (*Id.*) The Court quoted with approval (*id.* at 616-617) what Chief Justice Marshall had said in *Adams* v. *Woods,* 2 Cranch (6 U.S.) 336, 342: "This [the absence of any statutory bar] would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

provision bars reliance on the alleged illegality of conduct that was not timely challenged and was completed outside the limitation period, not merely for the purpose of securing a remedy for the time-barred conduct itself but for the purpose of making out a claim which necessarily depends on establishing that the time-barred conduct was illegal. The holding of that case is essential to preserve the integrity of the principle of repose which animates every statute of limitations.

It is the very nature of a statute of limitations that it will bar claims which would have been legitimate, and would have resulted in relief to the plaintiff, if the claim had been timely asserted. But as *Machinists* recognizes, this provides no justification for nullifying a limitations provision by permitting plaintiffs to establish that time-barred conduct not directly attacked was unlawful in order to convert present conduct otherwise lawful into a wrong. Justice Harlan there rejected the view that the "interest in employee self-determination * * * given large recognition" in the NLRA's substantive provisions "outweighed otherwise important competing considerations of burying stale disputes" embodied in the Act's limitations provision. (362 U.S. at 428.)

> We think this analysis inadmissible here, for the reason that the accommodation between these competing factors has already been made by Congress. It is commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. * * * As expositor of the

> national interest, Congress, in the judgment that a six-month limitations period did "not seem unreasonable," HR Rep. No. 245, 80th Cong., 1st Sess., p. 40, barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights. (*Id.* at 428-429, footnote omitted.)

This reasoning applies here with equal force. No one, who like the AFL-CIO, participated actively in securing the enactment of Title VII will ever forget that its enactment, like that of Taft-Hartley "entail[ed] the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable." (*Id.* at 428.) And, the adoption of the 90-day limitations period of § 706(d) in the Mansfield-Dirksen compromise which broke the filibuster against the 1964 Civil Rights Act shows that in 1964 as in 1947 repose was a "competing interest" which had to be accommodated to secure the enactment of any legislation.[10] "As expositor of the national interest" (362 U.S. at 428), Congress in Title VII established a 90-day limitations period (subsequently enlarged to 180 days) "to ensure expedition in the filing and handling of [discrimination] complaints." (*Love* v. *Pullman Co.*, 404 U.S. 522, 526.)

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[10] Whereas the House version of Title VII followed the NLRA in granting an individual with a claim six months to file a charge, one of the "softening [changes to] the enforcement provisions of Title VII" insisted upon in the Senate was a shortening of that period to 90 days. (See Equal Employment Opportunities Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (GPO), p. 3053 (the annotated text of the House bill showing the Senate changes) p. 3066 (statement by Sen. Clark).) The House accepted this and the other Senate amendments without a conference in order to avoid a resumption of the filibuster which, as all recognized, would have doomed enactment of any bill.

But we need not belabor the particulars which demonstrate that § 706(d) has the same place in Title VII that § 10(b) has in the NLRA. For this Court has just squarely declined an invitation to serve other interests by ameliorating § 706(d)'s terms. In *Electrical Workers* v. *Robbins & Myers, supra,* the petitioners argued that "utilization of grievance procedures tolls the running of the limitations period which would otherwise begin on the date of firing." (45 L.W. at 4068.) In support of that contention they "contend[ed] at some length that tolling would impose almost no costs, as the delays occasioned by the grievance-arbitration process would be 'slight'." (*Id.* at 4070.) Mr. Justice Rehnquist replied:

> [T]he principal answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites "with precision," *Alexander* v. *Gardner-Denver Co.*, [415 U.S. 36] at 47, Congress did not leave to courts the decision as to which delays might or might not be "slight." (*Id.*, footnote omitted.)

In *Electrical Workers* the petitioners sought only a modest extention in the time permitted for filing a charge claiming discrimination in discharge. Here, of course, the result sought is that the time period for filing such a charge never runs. The conclusion that the *Electrical Workers* holding mandates rejection of Mrs. Evans claim and adoption of the *Machinists* principle follows *a fortiorari*. For Justice Rehnquist's reasoning embodies the deference to the balance struck by Congress in selecting a particular limitations period that is the hallmark of *Machinists* and that Justice

Harlan summed up in the final sentence of that opinion: "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy. . . ." (362 U.S. at 429.)[11]

II

The Court of Appeals' opinion in this case fails entirely to consider that under its decision Mrs. Evans' claim that her original termination was illegal will never be time-barred; indeed the opinion gives no weight whatsoever to § 706(d). That court rested on 1) implications which it drew from *Franks* v. *Bowman Transportation Co. supra;* 2) its reading of the legislative history of the 1972 EEO Act; and 3) its reliance on the lower court precedents articulating the "perpetuation" doctrine which the Court of Appeals regarded as controlling. But as we now show, 1) not only is the Court of Appeals' reading of *Franks* wrong, but that decision, if correctly understood further buttresses our view that both of the unlawful employment practices alleged by Mrs. Evans are time-barred; 2) the 1972 legislative history has nothing to do with the present issue; and 3) the theory of the original "perpetuation" cases is inapplicable to Mrs. Evans; moreover, that theory is unsound.

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[11] While *Electrical Workers* rejects a case-by-case interest balaning approach to Title VII limitations questions, out of an abundance of caution we note that the apparent simplicity of determining whether Mrs. Evans' 1968 termination was an unlawful employment practice is atypical.

As this Court recognized in *McDonnell Douglas Corp.* v. *Gree*, 411 U.S. 792, 800-806, the trial of a claim of hiring, assignment or discharge discrimination normally requires the trier of fact to resolve conflicting claims concerning evanescent events and is therefore inherently complex. In a class action hiring discrimination case these complexities are multiplied in determining which of the affected class members are actual discriminatees. (See *Franks*, 424 U.S. at 772-773, and n.s. 31 and 32.) These difficulties are most aggrivated in perpetuation cases which frequently require reconstruction of employment decisions made 10 or even 20 years before the EEOC charge was filed. These cases have therefore proved to be perhaps the most time-consuming of all Title VII cases to try. (See, e.g., the Fifth Circuit's felt-need to develop sophisticated techniques for managing such cases reflected in *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (C.A.5).)

As Congress recognized in both the NLRA and Title VII, when a statute prohibits discrimination, the requirement of prompt notice enforced by a brief statute of limitations is particularly apt. "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." (*Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 348-349.)

[12] In the lower courts a limitations problem arose with respect to the individual claim of the named plaintiff in *Franks;* that issue was resolved in Franks' favor. (See 495 F.2d 398, 402-406.) The

1. In its original decision, the Court of Appeals, agreeing with the District Court, held that in both of the unlawful employment practices alleged by Mrs. Evans are time barred. However, the court below reversed its position on rehearing believing that the opposite result was required by this Court's intervening decision in *Franks.* The Court of Appeals was clearly mistaken in drawing this implication from *Franks.*

In *Franks* the proceedings which resulted, *inter alia,* in a finding that the employer had discriminated in hire had been timely begun, and no statute of limitations issue was presented or decided in this Court.[12] Rather, the problem of the case was that "nonemployee black applicants who ap-

plied for and were [discriminately] denied" certain jobs had been denied by the lower courts "any form of seniority relief." "Only" the propriety of that denial of *relief* was "before" the Court "for review." (424 U.S. at 750-752.) In resolving that remedy problem the *Franks* Court held that "that the Court of Appeals erred in concluding that, as a matter of law, § 703(h) barred the award of seniority relief [sought]" (*id.* at 762), and answered in the affirmative "the question whether an award of seniority relief is appropriate under the remedial provisions of Title VII, specifically, § 706(g)" (*id.*).

Thus, the Court did not hold that § 703 makes it an unlawful employment practice for an employer to apply a seniority system that does not discriminate against minorities or women generally to an individual with a claim that the employer had discriminated against him in hire. Indeed, the Court underlined the point that it was proceeding on the premise that the discrimination in hiring was the only § 703 violation before it:

> The underlying legal wrong affecting [the plaintiffs] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire. (*Id.* at 758.)

Here, of course, the question is whether, where the claim of initial discrimination is time-barred, the failure to grant back seniority to the putative discriminatee is a § 703 violation.

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issue in this Court arose out of the claims of two classes represented not by Franks, but by one Lee. (See 424 U.S. at 750-752.)

To be sure, if the Court had stated or implied that the substantive obligations imposed by § 703 on employers and unions, and the remedial powers granted the courts by § 706(g) are identical or that the remedial power has a narrower scope, *Franks'* reasoning could be said to support the decision below. But this Court adopted the opposite interpretation of the Act: the heart of its analysis of § 703 (h)—the provision the *Franks* Court of Appeals had taken to bar the relief sought—was that § 706(g) has a *broader* scope than § 703:

> On its face, § 703(h) appears to be only a definitional provision; as with the other provision of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not. Section 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 703(g), 42 U.S.C. § 2000e-5(g), in circumstances where an illegal discriminatory act or practice is found. Further, the legislative history of § 703(h) plainly negates its reading as limiting or qualifying the relief authorized under § 706(g). (*Id.* at 758-759.)

It is therefore plain that the holding that § 706(g) authorizes a court which has found a § 703 violation to order the employer to remedy that violation by granting the discriminatee "rightful place" seniority does not, as the court below thought, lead to the conclusion that an employer's failure to grant back seniority to an individual to grant back seniority to an individual against whom he had previously discriminated in hire (or discharge) is an independent § 703 violation.

2. The opinion below not only proceeds on a misunderstanding of *Franks'* basic holding, but also of the portion of

the opinion at 424 U.S. at 764-765, n. 21, discussing the legislative history of the 1972 EEO Act. *Franks*, as we have seen, was concerned with the proper interpretation of "the remedial provisions of Title VII, specifically § 706(g)." (*Id.* at 762.) And, the 1972 EEO Act did amend § 706(g). (See *id.* at 763-765 n. 21.) In *Franks*, this Court therefore canvassed the legislative history of this clearly relevant 1972 amendment to the provision before it. (See also, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414, n. 8, 420-421, which, like *Franks*, turned on § 706(g) and for that reason discussed the 1972 amendments.)

But the question to which the court below addressed itself was not one of remedy but of what acts are to be "deemed to be discriminatory" and hence unlawful employment practices. (A. 39-40.) The 1972 amendments throw no light on this § *703* question.

The 1972 EEO Act revised the enforcement mechanism of Title VII and covered certain employers previously excluded from the reach of the Act. (See generally *Chandler* v. *Roudebush*, 425 U.S. 840, 848-858.) Only one narrow, and entirely non-controversial, amendment to § 703, completely removed from the problem presented here, passed the Congress in 1972.[13] Indeed, so far as we are aware, no legis-

[13] That amendment was described as follows in the Section By Section Analysis of H.R. 1746, 118 Cong. Rec. 7166 (1972):

SECTIONS 8 (a) and (b)

These subsections would amend sections 703(a) and 703(c)(2) of the present statute to make it clear that discrimination against applicants for employment and applicants for membership in labor organizations is an unlawful employment practice. This subsection is merely declaratory of present laws as contained in the decisions in *Phillips* v. *Martin-Marietta*

lative proposal touched on whether the application of seniority systems otherwise lawful where the "effect is to perpetuate the disadvantages accruing from prior discrimination" (A. 40) is an unlawful employment practice. Accordingly, the Committee Reports and the floor debate are all but barren of any discussion that could possibly be deemed relevant to the proper resolution of this case.[14] Since Congress' attention was directed elsewhere, the 1972 legislative history does not even provide helpful guidance to

Corp., 400 U.S. 542 (1971); *U.S.* v. *Sheet Metal Workers International Assn., Local 36* 416 F.2d 123 (8th Cir. 1969); *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969).

[14] As explained in Part I, *supra*, the instant case implicates the interrelationship between §§ 703 and 706(d). While the 1972 EEO Act did not amend the former, it did extend from 90 days to 180 days the limitations period stated in the latter. But the 1972 legislative history does not address the question presented here. This is not surprising. The decision below which, as we have noted, does not even treat with the implications of § 706(d) for the validity of the "perpetuation" doctrine, typifies the approach of the cases enunciating that doctrine.

The only substantial discussion of § 706(d) is that contained in the Section by Section Analysis of H.R. 1746, *supra*:

Section 706[d]—This subsection sets forth the time limitation for filing charges with the Commission.

Under the present law, charges must be filed within 90 days after an alleged unlawful employment practice has occurred. In cases where the Commission defers to a State or local agency under the provisions of section 706(c) or (d), the charge must be filed within 30 days after the person aggrieved receives notice that the State or local agency has terminated its proceedings, or within 210 days after the alleged unlawful employment practice occurred, whichever is earlier.

This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved

the courts in determining what conduct constitutes an unlawful employment practice. Certainly, nothing in the EEO Act, or its legislative history, can be considered a leg-

person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which was determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected. It is intended by expanding the time period for filing charges in this subsection that aggrieved individuals, who frequently are untrained laymen and who are not always aware of the discrimination which is practiced against them, should be given a greater opportunity to prepare their charges and file their complaints and that existant but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight. Moreover, wide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertence, delay or error.

The time period for filing a charge where deferral is required to a State or local antidiscrimination agency has been extended to 300 days after the alleged unlawful employment practice occurred or to 30 days after the State or local agency has terminated proceedings under the State or local law, whichever is earlier. This subsection also restates the provision of Section 706(b) requiring a notice of the charges to the respondent within ten days after its having been filed.

As this Court recognized in *Electrical Workers* v. *Robbins & Myers, supra,* 45 L.W. at 4070-4071, the desire to "give the aggrieved person the maximum benefit of the law" does not justify departing from the requirement that EEOC charges are to be filed within the time period stated in the law. And, the holding in that case cuts directly against Mrs. Evans' reading of the Act which "means that the statute of limitations would never run" (*Machinists,* 362 U.S. at 416) on a discriminatory discharge. It is not contended here, nor in light of *Electrical Workers* could it be,

islative ratification of the lower court decisions interpreting § 703.[15]

3. As the court below correctly said, "It has been held in a number of instances that a facially neutral seniority policy may be in violation of Title VII if its effect is to perpetuate the disadvantages accruing from prior discrimination." (A. 39-40.) But the court below again misread *Franks* when it asserted that "*Franks* confirms these decisions." (A. 40.) On the contrary, *Franks'* principal holding demonstrates that the underlying rationale of the "perpetuation" doctrine does not apply to Mrs. Evans at all, and *Franks* interpretation of § 703(h) exposes one of several reasons why the perpetuation doctrine is fundamentally opposed to the Congressional intent.

a. The fountainhead of the doctrine is the following sen-

that Mrs. Evans' 1968 termination is a continuing violation. To be sure, the application to her since her 1972 hire of the continuous-time-in-service rule is "continuing in nature". Thus, the Section by Section Analysis does support the conclusion that if application of the rule is an unlawful employment practice, then Mrs. Evans is entitled to file her EEOC charge within 180 days "from the last occurrence of the discrimination and not from the first". But the question here is whether application of that rule under the circumstances of this case *is* discrimination prohibited by § 703. If it is not, the continuing violation doctrine plainly has no application. Finally, this case is not one of "existent but undiscovered acts of discrimination."

The sum of the matter is that the 1972 legislative history provides no warrant for departure from the sound principle enunciated in *Machinists.*

[15] While the foregoing is, we believe, more than sufficient to demonstrate that n. 21 of the *Franks* opinion does not pertain to the question here, we believe it proper to add with all deference that one portion of that footnote, not necessary to the decision in *Franks,* is unsound:

The legislative history underlying the 1972 amendments

tence in *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505, 516 (E.D. Va.):

> Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.

Whatever the merit of this observation (which we discuss at pp. 43-56 *infra*) it simply has no application to Mrs. Evans—for, as already explained (pp. 5-9 *supra*), unlike pre-Act discriminatees Mrs. Evans did not need to rely on the "perpetuation" doctrine to avoid the consequence of the original discriminatory termination. Whereas an individual who was discriminated against in hire or discharge before the enactment of Title VII could avoid the post-Act consequences of that discrimination only by the creation (legislative or judicial) of a duty to relieve him of those consequences—which is what the perpetuation doctrine does

completely answers the argument that Congress somehow intended seniority relief to be less available in pursuit of this goal. In explaining the need for the 1972 amendments, the Senate Report stated:

"Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements." S. Rep. No. 92-415, *supra*, at 5.

See also H.R. Rep. No. 92-238, *supra*, at 8. In the context of this express reference to seniority, the Reports of both Houses cite with approval decisions of the lower federal courts which granted forms of retroactive "rightful place" seniority relief. S. Rep. No. 92-415, *supra*, at 5 n. 1; H.R. Rep. No. 92-238, *supra*, at 8 n. 2. (The dissent, *post*, at 796-797, n. 18, would

—an individual who suffers such discrimination *after* the effective date of the Act can avoid the consequences of that § 703 violation whether or not the imposition of those consequences is declared to be an unlawful employment practice. If Mrs. Evans had filed a timely charge against her discharge under United's "no-marriage" policy, as did Mrs. Sprogis (see *Sprogis* v. *United Airlines, supra*, 444 F.2d 1194) she would have been entitled to receive reinstatement with back pay and seniority credit from the time of her discharge.

Under *Franks*, a discriminatee who pursues his statutory rights against an act of hiring or discharge discrimination is put in his "rightful place" as a § 706(g) remedy for the violation. To achieve that result it is unnecessary to stretch the substantive provisions of § 703 and to nullify the statute of limitations in § 706(d) through the "perpetua-

distinguish these lower federal court decisions as not involving instances of discriminatory *hiring*. Obviously, however, the concern of the entire thrust of the dissent—the impact of rightful-place seniority upon the expectations of other employees—is in no way a function of the specific type of illegal discriminatory practice upon which the judgment of liability is predicated.) Thereafter, in language that could hardly be more explicit, the analysis accompanying the Conference Report stated:

"In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed *that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.*" Section-By-Section Analysis of H.R. 1746, accompanying The Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166 (1972) (emphasis added).

The passage in S. Rep. No. 92-415 quoted above was included in the section of the Report entitled "NEED FOR THE BILL"

tion" doctrine. And, for this reason, the doctrine itself is wholly unsound, at least with respect to those who were first discriminated against in hire, discharge and assignment after the effective date of the Act and therefore were entitled to a make whole remedy so long as they filed a timely EEOC charge. The Court of Appeals' view that United had violated the Act by failing to "recant" (see L. Hand, J. in *N.L.R.B.* v. *Childs Co., supra,* quoted at p. 27, n. 7, *supra*) in response to Mrs. Evans claim that her termination outside the limitation period, and not perfected by a timely EEOC charge, was an unlawful employment practice attributes to Congress the intention to grant by implication in §703 that which it barred in § 706(d).

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and as the entire discussion in that subpart makes clear, was part of the Committee's explanation of its recommendation that the EEOC should be granted the authority to issue judicially enforceable orders. In H.R. Rep. 92-238, the same passage was included in the subsection entitled "CEASE AND DESIST ENFORCEMENT POWERS" and serves the same purpose. The House, in approving the Erlenborn substitute to the committee bill, the Senate, in approving the Dominick amendment to the committee bill, and both in accepting the Conference Committee's resolution of the differences in those two amendments *rejected* the suggestion that the EEOC should be granted these powers. (Chandler v. Roudebush, *supra,* 425 U.S. at 848-858.) Committee reports supporting proposals which were not enacted have previously been denied weight in ascertaining the meaning of legislation (see, e.g., *Labor Board* v. *Drivers Local Union,* 362 U.S. 274, 288-290), and since they do not constitute the views of the sponsors of the legislation enacted should not, according to the basic principles of statutory construction, be given any weight (see *Schwegmann Bros.* v. *Calvert Distillers,* 341 U.S. 384, 394-395). (Compare, *Chandler,* 425 U.S. at 859, n. 36.)

Further, we cannot read the portions of the Senate and House Reports discussed in n. 21 of *Franks* as "cit[ing] decisions of the lower courts • • • with approval." The case citations in question

b. We have thus far assumed that the "perpetuation" doctrine is valid in its original pre-Act discrimination context, for the present case must be decided in petitioner, United's, favor even if that assumption is indulged. However, an alternative ground for reversing the lower court's judgment is that the doctrine, which is an essential ingredient in the result reached below, is fundamentally unsound because Congress did not intend to readjust the seniority rights of pre-Act discriminatees as against the rights obtained by whites (or other non-discriminatees) before the Act; instead, when the issue was raised in the debates, the 1964 Congress deliberately chose to preserve existing seniority rights, as an essential part of the compromise which made enactment of the legislation possible.

1. In the absence of any evidence in the debates, the conclusion would be compelled, as a matter of ordinary statutory interpretation, that Title VII was to have prospective operation only, and that existing seniority rights were to remain undisturbed. For it has been long understood that:

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past

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annotate the sentence in each of those Reports which states in summary fashion the manner in which many experts "describe the [discrimination] problem" and the "subjects" often "discuss[ed]" in the "literature". There is no indication that the conclusions of these experts or the results reached by the lower courts, in general or in the particular relevant here, correctly capture the intent of the 1964 Congress as expressed in Title VII. This statement in the Reports is descriptive, not normative.

One final point. The assumption in the Section By Section Analysis ("it was assumed") that lower court decisions as of that time would govern the interpretation of Title VII "[i]n any area where the new law does not address itself" is just that—an assumption. It does not purport to be, and cannot be, a wholesale enactment of

> • • • [and] a retrospective operation will not be given to a statute which interferes with antecedent rights • • • unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (*Greene* v. *United States*, 376 U.S. 144, 160, quoting *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199.)

Plainly, a rule which requires the reduction of one employee's "competitive status' seniority" (*Franks*, 424 U.S. at 766) as of the time of the Act in favor of other individuals because the latter had previously been discriminated against "interferes with antecedent rights."

Congress, of course, has the power, if it chooses to do so, to provide post-Act relief for conduct occuring prior to (and therefore not violative of) the enactment of a new statute. A recent law imposed post-act liability for pre-act conduct is the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. § 901 *et seq.* which was held to be constitutional in *Usery* v. *Turner Elkhorn Mining Co.*, ... U.S. ....., 44 L.W. 5181, 5185-5187. Thus, whether such a result is desirable or not is beside the point. The question in each

these lower court decisions—whatever they may have held, and regardless of their reasoning and mutual consistency or inconsistency—into positive law. Nor, consistent with accepted principles of statutory interpretation, can this statement in the Section By Section Analysis be given weight in interpreting Title VII as enacted by the 1964 Congress. Even at best, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (*United States* v. *Price*, 361 U.S. 304, 313.) And here, the entire legislative history and the very breadth of the statement negate the possibility that the 1972 Congress in amending certain sections of Title VII focused on what was intended by the 1964 Civil Rights Act with respect to "area[s] where the new law does not address itself • • •," or studied the whole corpus of lower court decisions interpreting Title VII in those areas.

instance is whether Congress did intend to "interfere with antecedent rights"; the "first rule of construction" is that such an intention must be clearly shown. That question was answered in the affirmative in *Turner Elkhorn* because Congress had consciously and unequivocally decreed that answer. Title VII, far from 'unequivocal[ly]" and "inflexib[ly]" providing for retrospective effect, was authoritatively explained as having prospective effect only; and it was amended, in the course of passage, by the addition of § 703(h) to expressly protect existing seniority rights. This Congressional action, detailed in the *Franks* opinion (424 U.S. at 759-761) is, even absent the presumption of non-retroactivity, dispositive against the *Quarles* line of decisions—as we next show.

2. As this Court observed in *Franks:*

> The initial bill reported by the House Judiciary Committee as H.R. 7152 and passed by the full House on February 10, 1964, did not contain § 703(h). Neither the House bill nor the majority Judiciary Committee Report even mentioned the problem of seniority. That subject thereafter surfaced during the debate of the bill in the Senate. This debate prompted Senators Clark and Case to respond to criticism that Title VII would destroy existing seniority systems by placing an interpretive memorandum in the Congressional Record.[16]

The full text of the memorandum pertaining to seniority status is:

> *Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example,* if a business has been discriminating in the past and as a result has an all-white

[16] U.S. at 759, footnotes omitted.

working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. *He would not be obliged—or indeed, permitted*—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or *once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.* (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)[17]

At the same time, Senator Clark placed in the Congressional Record a Justice Department statement concerning Title VII:

> *First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect.* If, *for example,* a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. *It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of* course, if the seniority rule itself is discriminatory, it

[17] 110 Cong. Rec. 7207 (1964) quoted in *Franks,* 424 U.S. at 759, n. 15 (emphasis added).

would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. *Any differences in treatment based on established seniority rights would not be based on race and would not forbidden by the totle.*[18]

Senator Clark also introduced into the Congressional Record a set of answers to a series of questions propounded by Senator Dirksen, two of which are pertinent to the issue of seniority:

> Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> Answer. Seniority rights are in no way affected by

[18] 110 Cong. Rec. 7207 (1964) quoted in *Franks,* 424 U.S. at 760, n. 16 (emphasis added). The memorandum had been prepared by the Department "in rebuttal to the argument made by the Senator from Alabama [Mr. Hill] to the effect that Title VII would undermine the vested rights of seniority * * * and that Title VII would impose the requirement of racial balance" (110 Cong. Rec. 7213). Senator Hill was then the Chairman of the Committee on Labor and Public Welfare.

the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.

Question: If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists.[19]

These assurances that the bill "is not retroactive," that "Title VII would have no effect on seniority rights existing at the time it takes effect" and that the bill "will *not* require employers to change existing seniority lists" could not have been plainer or more unqualified. Yet so great was the concern that existing seniority rights be preserved and protected, and so essential was the cooperation and approval of Sen. Dirksen, the minority leader, if the filibuster was to be broken and a civil rights bill enacted, that steps were taken to make assurance double sure. That was the function of § 703(h).

Several weeks after Sen. Clark's foregoing representations, and "following formal conferences among the Senate leadership, the House leadership, the Attorney General and others, * * * a compromise substitute bill prepared by Senators Mansfield and Dirksen, Senate majority and minority leaders respectively, containing § 703(h) was introduced on the Senate floor." (424 U.S. at 760-761.) The "thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the

[19] 110 Cong. Rec. 7217 quoted in *Franks*, 424 U.S. at 760-761, n. 17.

post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." (*Id.* at 761.) And as this Court noted:

> Senator Humphrey, one of the informal conferees, later stated during debate on the substitute that § 703 (h) was not designed to alter the meaning of Title VII generally but rather merely clarifies its present intent and effect. 110 Cong. Rec. 12723 (1964). (*Id.*)

Thus, § 703(h) must be read as codifying the representations and assurances expressed by Sen. Clark and in the Department of Justice memorandum.[20]

3. These legislative statements directly answer in the neg-

[20] The pertinent portion of § 703(h) provides

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply difference standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *.

In light of the background just detailed, the phrase "bona fide" has its natural meaning of "good faith" and serves to assure that the seniority system is generally applicable and in fact generally applied and not an ad hoc contrivance. This conclusion is reinforced by comparing the "bona fide" phrase with its counterpart "professionally developed" in the portion of § 703(h) dealing with "ability tests". And, in light of the legislative history, the limitation of § 703(h)'s permission to exclude seniority systems that are "the result of an intention to discriminate" must refer to seniority systems adopted for the purpose of discriminating against minority groups or women and not to seniority systems adopted for other purposes which have the effect of disadvantaging individuals discriminated against in hire or assignment prior to Title VII's effective date. For the latter interpretation of the exclusion nullifies the assurances of its sponsors.

ative the question whether Congress intended to provide a cause of action against a seniority system which fails to remedy the effects of pre-Act discrimination. Yet, remarkably, the lower courts, have reached a result contrary to that which Congress mandated. Starting from the premise that Congress "could not" have meant to do what it did—to look forward and not to disturb preexisting relationships even though these relationships were affected by pre-Act discrimination—these courts have found their way around Congress' intent. The seminal cases in the development of the "perpetuation" theory, *Quarles* v. *Phillip Morris, Inc.*, *supra* and *Local 189, United Papermak. & Paperwork.* v. *United States*, 416 F.2d 980 (C.A. 5), circumvent the plain meaning of the legislative materials quoted above by deeming them to refer only to cases of pre-Act *hiring* discrimination and not to pre-Act *assignment* discrimination. So, it was said in *Papermakers:*

> No doubt, Congress, to prevent "reverse discrimination" meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination. As the court pointed out in *Quarles*, the treatment of "job" or "department seniority" raises problems different from those discussed in the Senate debates: "a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system." 279 F.Supp. at 517.
>
> It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of th previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. (*Id.* at 994.)

We begin by noting that this distinction between "hiring" and "assignment" discrimination on the ground that a hiring discriminatee has not earned "actual" seniority but that an assignment discriminatee has, is precisely the one which lead the *Frank's* Court of Appeals into error in dealing with post-Act discrimination. As this Court explained in correcting that error:

> The distinction plainly finds no support anywhere in Title VII or its legislative history. Settled law dealing with the related "twin" areas of discriminatory hiring and discharges violative of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, provides a persuasive analogy. "[I]t would indeed be surprising if Congress gave a remedy for the one which it denied for the other." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 187 (1941). For courts to differentiate without justification between the classes of discriminatees "would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed." *Id.*, at 188.

(424 U.S. 768, 769.)

It would, we submit, be equally surprising if in dealing with pre-Act discrimination, "Congress gave a remedy for one which it denied for the other."

Assuming that *Franks* is not dispositive we now treat with the distinction on the merits contrary to the Quarles view the applicant for a whites-only job who was turned down for that job and was offered a job open to blacks is not worse off than the applicant who was denied any job with an employer. On the contrary, he is better off, because he was given a choice between taking a job or looking elsewhere, a choice not open to the applicant who was turned down completely. Again, even if the situation of the two applicants is compared only with respect to seniority, the black applicant who took a job where the employer had a departmental seniority system is better off than the applicant who received no employment at all and who therefore obtained no seniority benefits with the employer.

Quarles and its progeny take internally inconsistent positions with respect to the value of departmental seniority. These opinions regard departmental seniority to be of sufficient value that they deem a requirement to give up that seniority to be too high a price for transferring to the previously white only department. Yet they do not recognize that the applicant who was turned down completely must give up whatever seniority he has achieved with his present employer in order to now take the job in the formerly white only department of the employer who had turned him down.

Moreover, these opinions treat departmental seniority as discriminatory between blacks and whites because they fail to recognize that departmental seniority protects employees

in each department from bumping by employees in other departments who have greater seniority on an employer-wide basis. Thus, if one assumes that before the Act there was an all-black department and an all-white department, and that the white department was skilled and the black unskilled and lower paid—a classic case of the discrimination at which the "perpetuation" doctrine is directed—in the event of a layoff among the skilled (white) employees the departmental seniority system protects black employees from being bumped by white employees who have worked for the employer for a longer period. For example, if, anticipating a reduced need in skilled personnel, the employer stops hiring into the skilled department but continues to hire into the unskilled unit, when it becomes necessary to lay off from the skilled department, the junior skilled employees, all of whom will have more years of service with the employer, would not be able to use that seniority to bump the employees in the unskilled department who had less employer seniority but who enjoyed departmental seniority.

The distinction drawn in the *Quarles* line of cases likewise makes no sense if it is examined from the viewpoint of those whose seniority as of the effective date of the Act is sought to be reduced in favor of those who had been discriminated against prior to the effective date of the Act and were hired into another department. For, it matters not to an employee whose expectations are defeated whether he is suddenly made junior to an individual who has been working in a different department, or one who has been working for a different employer. In either situation the job security which he has built up over the years is undermined by the operation of the Act. And this, of course, is the precise result against which Sen. Hill had warned, but which

the proponents of Title VII unequivocally disavowed.

This brings us to the more basic objection to the distinction between employment seniority and departmental seniority drawn in *Quarles* and its progeny: Even if a substantial rational distinction could be drawn, that is, if the equities of past discriminatees are greater where they have been hired into an inferior job rather than into none at all, or the legitimacy of the expectations of the white incumbents in the two situations could somehow be differentiated, the courts would still not be free to write that distinction into law. For, the legislative record is clear that Congress drew no such lines, adopted no such sophisticated distinctions, but unqualifiedly and unequivocally determined that the Act would be wholly prospective in its operation and that existing seniority rights would be preserved.

The *Quarles-Papermakers* doctrine relies on the fact that in some of the legislative statements reference is made to the rights of Negroes who had not been hired because of their race. But the opinions erroneously treat as a limitation of the principle that seniority rights would not be affected by language which in the statement was used only as an *illustration* of that principle. Thus:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, *for example*, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis.[21]

[21] 110 Cong. Rec. 7213, (emphasis added).

> Title VII would have no effect on seniority existing at the time it takes effect. If, *for example*, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.[22]

Not only does the *Quarles* reading disregard the phrase "for example," but it gives no weight to the many other statements that categorically deny any adverse effect on existing seniority rights. Thus, immediately following the language of the Justice Department memorandum quoted immediately above the following was declared:

> Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race.[23]

And, of course, Sen. Clark's answers to Sen. Dirksen's questions, quoted at pp. 47-48 *supra*, contained nothing from which an argument can even be attempted that in some situations existing seniority rights would be adversely affected.

Finally, the language of § 703(h) does not support or even suggest the distinction between employment seniority and departmental seniority which the *Quarles* line draws. The only possible basis for the opposite contention is the

[22] *Id.* 7210, (emphasis added).
[23] *Id.*

phrase "bona fide seniority or merit systems." But those words seem to be singularly ill-chosen to convey the distinction between existing seniority systems which adversely affect individuals who have not been hired at all, and those which adversely affect, among others in a department, those who had been turned down for a better (whites only) job. Indeed, parsing § 703(h) to create this distinction reverses history. As Sen. Humphrey made clear, § 703(h) was adopted, at the insistence of those who feared that seniority rights might be eroded, to embody into positive law the unequivocal assurance that those fears were unjustified. (See p. 48, *supra.*) To read that section more narrowly than those assurances is to treat the provision as an instrument for sapping the vitality of the sponsors' guarantees in a large, if not the largest, class of cases.

Indeed, the entire effort to explain away and dilute the unequivocal representations that Title VII would be prospective in operation and that seniority rights would not be adversely affected defames the integrity of the entire legislative process. It assumes that Sen. Clark and the Justice Department, and later Sen. Humphrey, engaged in carefully Aesopian language designed to appear to assure other members of Congress that seniority was absolutely protected but containing within it qualifications to enable courts to undermine such rights and to give § 703 an effect precisely the opposite of that which was understood in 1964. This transforms the sponsors of Mansfield-Dirksen substitute bill into the witting or unwitting deceivers of the other Senators to whom—as majority and minority leaders respectively—they had a special obligation of good faith. It should be unnecessary to say that such aspersion on those who were instrumental in achieving the enactment of Title

VII is unworthy.

In short, the effort to escape the consequences of the enactment of § 703(h) and the legislative history of that provision call to mind once again what this Court admonished in interpreting the 1972 EEO Act: "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." (*Chandler* v. *Roudebush, supra,* 425 U.S. at 848.) The courts which, adopted or approved the "perpetuation doctrine" have not fulfilled their duty to "reconstitute the gamut of values current at the time"; they have rebelled against those values. (Cf. *Woodwork Manufacturers* v. *NLRB,* 386 U.S. 612, 620 quoting L. Hand, J.)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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No. 76-333

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Supreme Court of the United States
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UNITED AIR LINES, INC.,
Petitioner,

v.

CAROLYN J. EVANS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, AIRLINE INDUSTRIAL RELATIONS CONFERENCE, AND AIR TRANSPORT ASSOCIATION

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICI CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council, the Airline Industrial Relations Conference, and the Air Transport Association respectfully move this Court for leave to file the accompanying brief as *Amici Curiae* in support of the position of the petitioner, United Air Lines, in this case. In support of this motion the above-named associations show as follows:

1. This motion for leave to file is necessary under Rule 42(3) because counsel for the respondent has advised that consent for the filing of this brief would not be granted. Counsel for the petitioner has given his written consent, which has been filed with the Clerk of the Court.

2. The questions presented for review in this case raise issues of substantial importance to the *Amici Curiae*. The first question concerns the proper application of a neutral date-of-hire seniority system under the terms of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, *et seq*). In this case the Court must consider whether the reemployment of a former employee with new date-of-hire seniority under a neutral seniority system permits the resurrection of that employee's time-barred claim for loss of seniority and pay arising from termination of that employee's prior employment. The petitioner also raises the question whether the collateral or lingering *effects* of a prior act of discrimination are, *in themselves*, acts of discrimination against an employee, permitting the filing of a charge at any time in the future regardless of how long ago the prior act of discrimination occurred.

3. The Equal Employment Advisory Council ("EEAC") is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government

policies, procedures and requirements pertaining to nondiscriminatory employment practices.

Because of this interest, the EEAC sought and was granted permission to file a brief as *Amicus Curiae* in *Electrical Workers, IUE, Local 790* v. *Robbins & Meyers, Inc.*, (U.S. Sup. Ct. No. 75-1264), which also involved issues concerning Title VII's statute of limitations. Similarly, the EEAC has filed *amicus curiae* briefs in other cases now pending before this court. See *T.I.M.E.-D.C., Inc.* v. *Rodriquez* (Docket No. 75-672); *East Texas Motor Freight System, Inc.* v. *Jesse Rodriquez, et al* (No. 75-718).

4. The Air Industrial Relations Conference ("AIR Conference") is an unincorporated voluntary association of air carriers formed to facilitate the exchange of ideas and information among air carriers concerning industrial relations matters, to provide support and information services to air carriers in the industrial relations area, and to represent the member carriers with respect to legislative, judicial and administrative matters related to or affecting labor relations in the airline industry. The airlines' agreements establishing AIR Conference have been approved by the Civil Aeronautics Board, pursuant to Section 412 of the Federal Aviation Act,[1] and, upon review, by the Court of Appeals for the District of Columbia Circuit.[2] AIR Conference presently has 21

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[1] CAB Orders 73-6-96 (June 22, 1973), 73-9-15 (September 6, 1973), and 76-5-12 (May 5, 1976).

[2] *Air Line Dispatchers Assn.* v. *Civil Aeronautics Board*, 506 F.2d 1321 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 988 (1975).

members, including most of the U.S. trunk and local service air carriers.[3]

5. The Air Transport Association ("ATA") is an organization of major domestic and international U.S. airlines employing hundreds of thousands of employees in the airline industry throughout their route systems.[4] Various constituent members of the ATA have been parties defendant in litigation in lower federal courts throughout the country in cases which have raised new and important questions concerning

[3] Present members of AIR Conference include: Air New England, Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Hughes Airwest, National Airlines, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Airlines, Reeve Aleutian Airways, Inc., Texas International Airlines, Inc., United Airlines, Inc., Western Airlines, Inc. and Wein Air Alaska, Inc. Trans World Airlines, Inc. also is a member of AIR Conference but is filing a separate motion and brief *amicus curiae* on its own behalf.

[4] Present members of the ATA include: Air Canada, Alaska Airlines, Inc., Allegheny Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Braniff International, CP Air, Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Air, Hughes Airwest, National Airlines, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Airlines, Southern Airways, Inc., Texas International Airlines, Inc., United Airlines, Inc., Western Air Lines, Inc., Wein Air Alaska, Inc. Delta Air Lines, Inc., Pan American World Airways, Inc. and Trans World Airlines, Inc. also are ATA members but are filing separate motions and briefs *amicus curiae* on their own behalf.

the statute of limitations of Title VII and neutral seniority systems.

The views of certain members of ATA have been accepted previously by this Court in another Title VII case. See *Liberty Mutual Insurance Co.* v. *Wetzel, et al.*, (No. 75-1245).

6. The *Amici Curiae* and their constituent members have hundreds of thousand of employees who are covered by the provisions of Title VII of the Civil Rights Act of 1964. Most of these employees—and particularly airline flight personnel—also are covered by neutral date-of-hire seniority systems similar to that involved in these proceedings. Seniority systems such as these govern many aspects of such employees' professional careers with their employers. The Court's decision in this case could have a major impact on these companies, their employees, and their relations with their employees' collective bargaining representative. Accordingly, the *Amici Curiae* have a direct interest in the issue presented here for the Court's consideration.

7. The associations joining this motion have a broad knowledge of issues concerning the application of Title VII and its limitations period to seniority systems such as that involved in this case. Because of this background, the associations joining herein are uniquely situated to brief this Court on the practical, as well as the legal, aspects of the issues presented here.

WHEREFORE, it is respectfully moved that the above-named associations be granted leave to submit the accompanying brief as *Amici Curiae* in this case.

Respectfully submitted,

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INDEX

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, AIRLINE INDUSTRIAL RELATIONS CONFERENCE, AND AIR TRANSPORT ASSOCIATION

INTEREST OF THE *AMICI CURIAE*

This brief is submitted pursuant to Rule 42(2) and (3) of this Court. The Equal Employment Advisory Council ("EEAC"), the Airline Industrial Relations Conference ("AIR Conference"), and the Air Transport Association ("ATA"), the *Amici Curiae*

herein, have a substantial interest in the outcome of this case. As indicated more fully in the accompanying motion to file this brief, the *Amici* and their members or constituents, have hundreds of thousands of employees throughout the country who are covered by the provisions of Title VII of the Civil Rights Act of 1964. Most of these employees—and particularly airline flight personnel—are also covered by collective bargaining agreements containing neutral date-of-hire seniority systems which govern many aspects of such employees' professional careers with their employers. As such, the *Amici Curiae* have a direct interest in the basic issue here presented for the Court's consideration, to wit:

> Whether or not the rehiring of a formerly terminated employee and the assignment to her of her new date-of-hire place in her employer's neutral date-of-hire seniority system (instead of awarding her seniority based upon her original date-of-hire) constitutes a new discriminatory act in violation of Title VII or perpetuates the effect of her prior allegedly unlawful termination so as to revive her right to litigate the legal propriety of that termination otherwise long since barred by Title VII's applicable statute of limitations.

SUMMARY OF THE ARGUMENT

An employee's place in a date-of-hire seniority system will generally govern, among other things, each employee's job assignments, compensation, eligibility for transfer or promotion, liability to layoff, and order of recall throughout his or her employment. Thus the correctness of an employee's place in that seniority

system is of great importance not only to the individual employee involved but also to his or her fellow employees whose relative seniority positions and future opportunities will be affected by any alteration in the seniority order. It is equally important to the employer who may, under the decision below,[1] be held liable to an employee because of any damages suffered from the employee's allegedly wrongful placement in the seniority system. Likewise, the employees' collective bargaining representative also has a stake in the integrity of the seniority system contained in its contract with the employer.

The *Evans* II decision below treats as a litigable claim an entirely discrete, non-discriminatory seniority assignment upon rehire as the perpetuation of a claimed prior unlawful termination long since barred by the statute of limitations. In so doing, the decision destroys Title VII's statute of limitations in rehire and similar situations; promotes uncertainty in one of the most sensitive areas of employee relations—seniority; abrogates the Congressional policy of prompt resolution of discrimination claims; and subjects employers to liability of unknown extent resulting from future claims for damages caused by allegedly unlawful placement in seniority systems which, under *Evans* II, may remain latent but alive throughout the claimant's employment, subject to assertion or non-assertion at the claimant's whim.

For these reasons, employers and their employees have a vital interest in the reversal of this case

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[1] *Evans* v. *United Air Lines, Inc.*, 534 F.2d 1247 (7th Cir. 1976) ("*Evans* II").

and in a decision from this Court which—while preserving each employee's right to challenge an allegedly discriminatory act (including the propriety of his or her place in a neutral seniority system) within the statutory time fixed by Congress—effectuates the time limits within which Congress has required such challenges to be made. Such a decision would uphold the Congressional policies described above and protect the legitimate interest of employers and fellow employees in the correctness and reliability of the seniority systems which govern their relationships and opportunities.

THE PROCEEDINGS BELOW

A) The Facts

As set forth in detail in *Evans* v. *United Air Lines, Inc.*, —— F.2d ——, 12 FEP 288 (7th Cir. 1976) ("*Evans* I"), between November 1966 and February 1968 Evans was a stewardess for United Air Lines ("UAL"). At that time UAL required married stewardesses to resign their employment, and in February 1968 Evans was involuntarily terminated by UAL because of her marriage. On November 7, 1968, UAL discontinued its policy of requiring stewardesses to remain unmarried. After her termination in February 1968 Evans had no employment relationship of any kind with UAL until February 1972.

On February 16, 1972, four years after her termination, Evans—never having filed any charge of discrimination against UAL—was again hired by UAL as a stewardess. She was given the regular training for newly hired stewardesses which she completed on March 16, 1972. Evans was then assigned seniority

in UAL's admittedly non-discriminatory date-of-hire seniority system as of her 1972 date of hire, as were all the other new hires who completed the training with her. In accordance with its policy of giving both men and women seniority credit only for "continuous time in service," UAL did not give Evans seniority credit for her prior employment as a stewardess.

On February 21, 1973—five years after her original termination, four years after UAL had eliminated its no-marriage-for-stewardesses policy, and at least eleven months after Evans had been re-employed and received her new seniority place in a sexually neutral and non-discriminatory seniority system (see above) —Evans filed a charge with the Equal Employment Opportunity Commission ("EEOC") claiming that her *1968* termination was an unlawful discriminatory practice based on sex and demanding the "seniority and back pay" that she lost by reason of that termination [Appendix (hereinafter "App.") 21]. Following receipt of an EEOC "right to sue" letter, Evans filed suit against UAL to obtain seniority credit for her pre-termination employment and other requested relief.

B) Evans I

UAL moved to dismiss that suit on the ground that Evans's 1973 EEOC charge was untimely by many years since, before 1972, Title VII then required such a charge to be filed within 90 days of the alleged discriminatory practice, *viz.*, the 1968 termination;[2] that Evans had lost both employment and seniority

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[2] Even if the 1972 extension of the limitation period to 180 days were applicable to this suit, Evans's charge would still have been untimely. *See* pp. ~~2-4~~ 4-5, above.

as of that date; that she thereafter had no employment relationship of any kind with UAL until February 1972; and that her 1972 rehire as a new employee did not alter those facts since the two employments were entirely separate. Evans claimed that her charge was timely since UAL's refusal to accord her upon rehire in 1972 seniority credit for her pre-termination service perpetuated *up to the time of suit* the prior unlawful 1968 termination. The District Court agreed with UAL and dismissed the complaint. On appeal, the Court of Appeals for the Seventh Circuit in *Evans* I affirmed the District Court (Cummings, J., dissenting) (see App. 20-30).

The majority in *Evans* I, citing *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. den.* —— U.S. ——, 44 USLW 3670 (1976), and *Collins* v. *United Air Lines*, 514 F.2d 594 (9th Cir. 1975), held that, since UAL's 1972 assignment of seniority to Evans was *itself* a non-discriminatory act based on UAL's admittedly non-discriminatory policy of allowing seniority only for "continuous service," that assignment did not perpetuate any alleged past discrimination against Evans "in the sense required to constitute a violation of Title VII" (App. 27). It specifically adopted the Ninth Circuit's ruling in *Collins, supra,* that "the alleged unlawful act or practice—*not merely its effects*—. . . must have occurred within [the statutory period] preceding the filing of charges before the EEOC" (App. 25-26; emphasis supplied). Holding that Evans's 1972 rehire did not alter the fact that the *1968* termination was a separate and *completed* act, the Court concluded that since there was "no continuing discriminatory practice with respect to Evans, her only

basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968" and a suit based on that was barred by Title VII's statute of limitations (App. 27-28). Given the discrete nature of the first and second Evans employments, *Evans* I appears clearly correct.[3]

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[3] Judge Cummings's dissent was based upon his view that the application of UAL's non-discriminatory policy of allowing seniority credit only for "continuous service" gave "collateral effect to [a] past act of discrimination," which discrimination was "the proximate cause of the disparity complained of by plaintiff" (App. 27, 28). The dissent ignored the fact that for the four years between her termination and her rehire Evans had failed to file any charge with respect to her 1968 termination and the further fact that 90 days after that termination Evans had lost any right to do so. Judge Cummings concluded, however, that her rehire (as a new employee) in 1972 revived that theretofore expired right simply because, upon rehire, UAL applied to Evans the same "continuous service" seniority policy it applies to every flight attendant, male or female (App. 23-24, including ftnote 4).

Judge Cummings accepted with equanimity the holding of *Collins* v. *UAL, supra,* that Mrs. Collins should *lose* her "termination-for-marriage" suit against UAL because she had failed to challenge her termination within the 90-day period and UAL had never rehired her. At the same time he would have permitted Mrs. Evans to *win* her "termination-for-marriage" suit against UAL (although she too had failed to challenge her termination within the 90-day period) only because UAL had been unwary enough to rehire her and thus—according to Judge Cummings—to revive her obviously barred claim (see App. 30). He dismissed as inconsequential the chilling effect that success for his view would almost certainly have on the rehire of former employees (see App. 25, 30, majority ftnote 5 and dissent ftnote 2).

Judge Cummings also ignored the possibility UAL might have been subject to serious challenges by other employees

C) Evans II

Thereafter, petitions for rehearing by the panel and *en banc* were filed, during the consideration of which this Court decided *Franks* v. *Bowman*, 424 U.S. 747 (1976). "In view of [that] decision" (App. 35), the panel which had decided *Evans* I reheard the case and reversed its opinion (see *Evans* II, *supra*).

For all practical purposes, the statements of facts and of the contentions of the parties in *Evans* I and *Evans* II are identical. However, in describing UAL's contention that "the only legally cognizable injury to Evans was her termination of employment and seniority in 1968," the court in *Evans* II added, gratuitously and apparently with no support in the record, that "[i]n this respect United's argument would appear to rest, *sub silentio*, on the protection afforded bona fide seniority systems by section 2000e-2(h)" (App. 36).[4] The Court then summarized UAL's remaining contentions as arguing that (1) since UAL's "continuous time-in-service" seniority policy is neutral with regard to sex, that policy does not violate Title VII and any actionable injury to Evans "stems from her termination in February, 1968, *whereby she lost her initial seniority*"; and that, (2) since her time to complain against that termination and loss began to run in *1968*, any complaint about that loss was long since barred in 1973 (App. 37; emphasis supplied).

if it had disregarded for Mrs. Evans the "continuous service" seniority requirement which it applied to all other persons with breaks in service.

[4] UAL had no need for the alleged "protection" of Section 703(h) since its whole position was unassailable without it: (1) Evans was terminated in February 1968 and her employment and seniority then ceased; (2) it is well settled that discriminatory termination is a completed act at the time thereof and must be complained about within the statutory period; (3) Evans did not complain within that period; (4) Evans was not an employee of UAL for the next four years and had no employee rights or benefits of any kind; (5) when Evans was rehired in 1972 it was as a new employee; (6) *all* new employees, male and female, receive seniority as of date of hire: therefore, Evans suffered no discrimination by the 1972 seniority award. No resort to Section 703(h) is necessary to establish UAL's case (see *Evans* I, *supra*, *passim*).

The court, having itself injected Section 703(h) into the *Evans* II case, then proceeded to consider the holding of *Franks* v. *Bowman* with respect to that Section. It correctly paraphrased *Franks* as holding that Section 703(h) did not preclude the grant of retroactive seniority under a facially neutral seniority system *"as a form of relief"* where the individual complainants *"could prove"* that they had been the actual victims "of discriminatory hiring practices" (App. 37; emphasis supplied). The remainder of the court's comments about *Franks* consists of references to discrimination as a "complex and pervasive phenomenon" and to the Title VII objective of "make whole" relief (App. 38).

Asserting that it was "in the context of" that analysis of *Franks* that the court must consider whether or not Evans's complaint was filed "within 90 days of a violation of Title VII," the court stated that that depended upon whether *Section 703(h)* "may be used to interpose a legal bar to Evans's theory

that the perpetuation of past discrimination through United's current seniority policy constitutes a continuing violation of Evans's Title VII rights" (App. 39).[5] The court recited the obvious facts that a "seniority policy that credits only continuous time-in-service" necessarily adversely affects rehired employees as against those continuously employed; that thus a previously terminated employee who is later rehired will encounter these adverse effects; and that such rehired employees might include one previously improperly terminated. The court then leapt to the conclusion that the routine application to a rehired employee of an unexceptionable seniority policy (applicable to *every* employee, male or female, long-term, new hire, or rehire) constitutes unlawful "perpetuation" of the previous unlawful termination. It cited the "teaching of *Franks*" as confirming "these holdings" and concluded that, therefore, Section 703(h) "cannot be used" to bar Evans's claim (App. 40), although UAL had never claimed it did (see page 9 above). Accordingly, the Circuit Court reversed its earlier position and decided that Evans's claim concerning her 1968 termination could be maintained.

THE POSITION OF THE *AMICI CURIAE*

It is the position of the *Amici Curiae* that the decision in *Evans* II is incorrect and must be reversed. In misconstruing this Court's decision in *Franks* v. *Bowman*, the Seventh Circuit effectively repeals Title VII's statute of limitations in cases of barred claims of alleged discriminatory employ-

[5] The significance of the court's injection of Section 703(h) into the case now becomes apparent.

ment termination followed by later rehire in contravention of Congress's obvious intent that charges of discrimination be brought and resolved promptly (see Point I, below). In addition, the decision, if allowed to stand, necessarily leads to illogical and inequitable differentiations in termination cases and is inconsistent with important practical and equitable considerations in matters of seniority in ways which will adversely affect both employers and employees (see Point II, below).

Evans's suit is barred because she did not file a timely charge with the EEOC concerning "the underlying legal wrong" about which she now complains—her involuntary termination in 1968 for violation of UAL's no-marriage policy for stewardesses.[6] Her rehire in 1972 did not revive her previously barred claim and every logical, practical, and equitable consideration, as well as proper principles of judicial administration and economy, support the conclusion that her present seniority is proper and legal, and *Franks* v. *Bowman* does not require that it be disturbed.

ARGUMENT

I. EVANS I CORRECTLY APPLIED TITLE VII'S STATUTE OF LIMITATIONS TO BAR EVANS'S PRESENT CLAIM AND FRANKS v. BOWMAN DOES NOT REQUIRE OR COUNTENANCE THE DECISION REACHED IN EVANS II.

As set forth at pages 6-7, above, *Evans* I, relying upon *Waters* v. *Wisconsin Steel Works*, *supra*, and *Collins* v. *United Air Lines, Inc.*, *supra*, held that Evans's 1968 termination was a separate and dis-

[6] *See, Franks* v. *Bowman, supra*, 424 U.S. at 758.

tinct act, a complaint about the alleged discriminatory nature of which had to be filed within the 90 day period then required by Title VII, Section 706(e), 42 U.S.C. § 2000e-5(e). It further held that failure so to file a charge within that statutory period extinguished Evans's right thereafter to litigate any claim she previously had had as to the propriety of that termination.

Based upon that reasoning, the court rejected Evans' contention that UAL's assignment of 1972 seniority to her on the occasion of her rehire in that year constituted a current violation of Title VII because, by denying her the seniority lost upon her prior termination, UAL continued into the present the illegality of that termination. *Evans* I held, with *Collins*, that the discriminatory act actually complained of must have occurred within the statutory period in order to support a suit based thereon and that a non-discriminatory act which was merely an "effect" of the prior barred violation could not bring forward into the present the basic underlying legal wrong of which she actually was complaining.[7] Since the rationale and basis for the conclusions reached in *Evans* I are compellingly contained therein, it seems unnecessary to elaborate upon them here.[8]

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[7] While Evans seeks to state her claim in terms of "a continuing violation," it is logically impossible to conceive of it in "continuing" terms. It can really only be stated as the *revival* of an extinguished claim by virtue of the occurrence of a discrete and separate circumstance (in this case rehire) which happens to involve a nondiscriminatory act which is different in its scope and consequences because of the prior termination but is otherwise entirely unconnected with it.

[8] It is, however, interesting—and probably not without significance—to note the similarity between the emphasis in *Collins* and *Evans* I upon the centrality of the "alleged unlawful act or practice—not merely its effects" and the concept of "the underlying legal wrong" subsequently relied on by this Court in reaching its decision as to *remedy* in *Franks* v. *Bowman*.

Franks v. *Bowman* not only does not require the contrary conclusion to *Evans* I which the Seventh Circuit, in *Evans* II, considered that it did, but, in fact, supports that court's original decision. In completely abandoning its first opinion, the Seventh Circuit stated that "[t]he teaching of *Franks*" confirmed its holdings in *Evans* II that, since the application of a non-discriminatory continuous time-in-service seniority policy to a rehired employee previously terminated on time-barred discriminatory grounds adversely affects that employee because of the prior termination, application of that seniority policy "is deemed to be discriminatory." Thus, although "facially neutral," the application of such a seniority policy makes Evans "the victim of current discrimination" (App. 37, 39, 40). But *Franks* "teaches" no such things.

First, *Franks* teaches that Section 703(h)—[which the *Evans* II panel, not UAL, invoked (see pages 8-9, above)] provides that operation of a facially neutral seniority system is *not* a violation of Title VII merely because it perpetuates the effects of pre-Act discrimination. This Court concluded that Section 703(h) was "only a definitional provision" aimed at "defining what is and what is not an illegal discriminatory practice" if post-Act operation of a seniority system is challenged as perpetuating the effects of pre-Act discrimination (see 424 U.S. at 758, 761). In other words, as described by Mr. Justice Powell

(concurring in at least this aspect of the decision), this Court held that Section 703(h) insulates "an otherwise bona fide seniority system from a challenge that *it* amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination" (*id.* at 781; emphasis supplied.)[9]

Second, it teaches that if an individual *can prove* that he or she was a victim of a discriminatory refusal to hire that individual *may*, if appropriate, receive, among other things, an adjusted "rightful" place in the seniority system as a *remedy* for the proven discrimination. This Court held that, since the "*underlying legal wrong*" about which the plaintiffs were complaining was the prior discriminatory refusal to hire and *not* the "alleged operation of a racially discriminatory seniority system," Section 703(h), as the Court had interpreted it, did not prohibit seniority adjustments within the seniority system, *as a matter of remedy*, "once an illegal discriminatory practice occurring after the effective date of the Act is *proved—as in the instant case, a discriminatory refusal to hire*" (*id.* at 758, 762; all emphasis supplied). Thus, under *Franks*, the critical factor must be the ability to *prove* the prior discriminatory practice. Nowhere does *Franks* "teach",

[9] It is apparent throughout the *Franks* opinion that when the Court is speaking of a *bona fide* seniority system or of "the existing seniority system" it is speaking of a system, like the UAL one in this case, which was non-discriminatory in langauge and application, was not the result of an intention to discriminate on any prohibited ground, and in which petitioners sought, as Evans does here, the seniority they would have enjoyed were it not for the discriminatory acts about which they were complaining (see 428 U.S. at 758).

or even intimate, either that the routine assignment of actual date of hire (or rehire) seniority in a facially neutral seniority system *itself* constitutes a violation of Title VII or that such routine assignment "perpetuates" an otherwise barred "underlying legal wrong" so as to "unbar" it.[10]

The clear implication of the *Franks* decision is that the operation of any *bona fide* seniority system is not *itself* a violation of Title VII, but that *if* a prior substantive Title VII violation can be proven (which Evans's by reason of untimeliness cannot) appropriate adjustments in the successful complainant's place within that system may be made to remedy that *prior* violation. By reviving Evans's long-barred claim of prior illegal termination by means of calling the routine operation of a *bona fide* system ~~of~~ unlawful "perpetuation" of that previous discrimination, *Evans* II has converted the availability of a *remedy* into the substance of a *wrong*. By this reasoning, the court has perverted *Franks* from a salutary vindicator of the Congressional objective of providing "make whole" relief for

[10] Such results are particularly difficult to accept in the *Evans* case where suit upon her *termination* was (like the complainant's in *Collins* v. *UAL*, *supra*) clearly barred 90 days after the termination. Thereafter, no employment relationship existed between Evans and UAL nor did any right to complain to the EEOC about the former relationship. How then can the routine act of conferring date-of-hire seniority upon Evans, as upon any other rehire, itself become an unlawful employment practice as to her alone when she had long since forfeited her right to complain about the prior termination? Or how can that routine non-discriminatory act "perpetuate" as to Evans a prior discrimination as to which she had long since lost her right to sue? That could be nothing but "revival" and *Franks* v. *Bowman* permits no such thing.

still viable "underlying legal wrongs" into an instrument for frustrating the Congressional provision that discrimination charges should be brought and disposed of promptly [see Title VII, § 703(g); 42 U.S.C. § 2000e-2(h)].

In *Franks*, this Court ordered events correctly: *if* a plaintiff could prove the underlying legal wrong, *then* a Court might order changes in plaintiff's place in a seniority system. But *Evans* II has turned *Franks* v. *Bowman* upside down. There, the Seventh Circuit held that *if* a plaintiff seeks a change in her place in a seniority system assigned pursuant to a non-discriminatory policy but unsatisfactory to her because of a prior but barred underlying legal wrong, *then* the plaintiff may avoid the statute of limitations and litigate her case about that underlying wrong. If the "rationale" of *Evans* II prevails, there is no effective statute of limitations for cases of alleged prior discriminatory acts followed by later hire or rehire—a result never contemplated by this Court in *Franks* v. *Bowman*.

For the above reasons, *Evans* II—decided on a ground not urged by UAL, entirely unsupported by *Franks* v. *Bowman*, conducive to future reluctance to hire or rehire, and impossible to reconcile with Title VII's statute of limitations—should be reversed by this Court.

II. THE PURPOSES DESIGNED TO BE SERVED BY THE TITLE VII STATUTE OF LIMITATIONS AND OTHER PRACTICAL AND EQUITABLE CONSIDERATIONS REQUIRE REVERSAL OF EVANS II.

It has long been recognized that the purpose of Title VII's relatively short statute of limitations is to

require the prompt filing and resolution of charges of discrimination in order to serve everyone's valid "interests in prohibiting the prosecution of stale [claims]" [see, *e.g.*, *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 464 (1975); *Hecht* v. *Cooperative for American Relief Everywhere*, 351 F. Supp. 305, 310 (S.D.N.Y. 1972)]. Such prompt filing not only facilitates effective investigation of the alleged discrimination while memories are still fresh and witnesses and evidence current and available but also encourages prompt disposition of the same with consequent stabilization of the employment situation involved in the complaint to the advantage of the complainant, the challenged employer, and his other employees [see *Local Lodge No. 1424, I.A.M.* v. *N.L.R.B.*, 362 U.S. 411, 419 (1960)] That Congress intended and still intends to put a sharp limit upon the period within which an aggrieved person can prosecute a discrimination claim or be forever barred therefrom is established by the fact that when Congress revised Title VII in 1972 it extended the period within which discrimination charges must be filed from 90 to 180 days, *but it did not abolish* it [compare 78 Stat. 253 (1964) with 86 Stat. 103 (1972); see *Local Lodge No. 1424, I.A.M.* v. *N.L.R.B.*, *supra*, at 428-429].

As noted above (see pages 11-12), *Evans* II effectively repeals Title VII's statute of limitations for filing charges with the EEOC [11] at least in cases of

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[11] The timely filing requirement of Title VII are widely held to be "jurisdictional" in nature [see, *e.g. McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Bowe* v. *Colgate Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969); *Collins* v. *United Air Lines, Inc.*, *supra*, 514 F.2d at 596].

alleged discriminatory terminations followed by rehire after the expiration of the statutory period of limitations. It does so by considering the formerly aggrieved person's new, but allegedly wrongful, place in a neutral seniority system to constitute a continuation of the previously barred unlawful termination as long as that allegedly wrongful place is not altered so as to remove any lingering effects from the prior termination.[12] This not only abrogates the Congressional intent embodied in the statute of limitations but also has other illogical and undesirable effects.

First, it illogically—and ironically—accords to unlawfully terminated employees who are fortunate enough to be rehired after the expiration of the statutory period of limitations apparently unlimited rights to litigate the legality of their previous termination. By sharp contrast, the filing rights of less fortunate employees identically terminated but not rehired are limited to the 180 days statute of limitations period after which their rights to complain are forever extinguished (compare *Evans* II with *Collins* v. *UAL*, *supra*). This is not only grossly unfair

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[12] According to *Evans* II it is the allegedly wrongful seniority date which effectuates the "continued" discrimination. The assignment of that date took place in March 1972 but the Seventh Circuit held timely Evans's complaint to the EEOC which was not filed until five months more than the allowed 180 days after the alleged discriminatory seniority assignment occurred. Therefore, it is apparent that under *Evans* II the *continued existence* of the seniority place prevents the running of the limitations period on both the allegedly wrongful seniority place *and* the underlying legal wrong. [but *cf. Bowen Products Corporation*, 113 NLRB 731, 732-733 (1955), cited with approval by this Court in *Local Union 1424, I.A.M.* v. *N.L.R.B.*, *supra*, at 420, including ftnote 12].

and entirely unsupportable as a legal position. It is also almost guaranteed to discourage employers from rehiring formerly terminated employees more than 180 days after their termination where there is any possibility that they may consider their prior termination to be tainted by unlawful discrimination (see *Evans* I majority opinion, App. 25; but see dissent, App. 30). Such a result is clearly not in the interest of the employer, the employees, or the general public.

Second, it leaves unsettled for an indefinite but apparently unlimited period the correctness and reliability of the seniority order governing the most essential aspects of the business lives of all employees covered by neutral date-of-hire seniority systems. If *Evans* II stands, any rehired employee, such as Evans, given seniority from his or her actual rehire date may at *any* time thereafter throughout his or her employment, challenge the propriety of that seniority on the basis of a prior allegedly discriminatory, but time-barred termination, and force a rearrangement of the seniority order on which his or her fellow employees had up to then reasonably relied for the future. No appropriate public policy is served by permitting the existence of such an open-ended disruptive right.

Third, the unlimited right of a rehired employee to challenge at any time during his or her employment the alleged discriminatory nature of a remote act which somehow adversely affected his or her place in a neutral date-of-hire seniority system, subjects the employer of any rehired employee to liability of unknown, and indeed unknowable, extent resulting from future claims for damages caused by allegedly unlawful placement in seniority systems. Such

claims, under *Evans* II, may remain latent but alive throughout the claimant's employment, subject to assertion or non-assertion at the claimant's whim (see *Bowen Products Corporation, supra*, 113 NLRB at 732). Here again, there is no rational justification for such a result and no appropriate public policy is served thereby.

Finally, *Evans* II—(as distinguished from *Evans* I, which also avoids all the above-described illogical and undesirable results)—promotes the absence of finality in cases of alleged discriminatory terminations and encourages belated and dubious challenges to the propriety of ostensibly non-discriminatory assignments of seniority in an admittedly neutral date-of-hire seniority system. As a result, *Evans* II undermines accepted principles of judicial administration and economy. It also needlessly directs judicial attention to suits involving long barred claims of prior discrimination somehow related to present non-discriminatory acts, rather than to suits concerning present discrimination not yet remedied.

CONCLUSION

Evans I was correctly decided. Its replacement by *Evans* II was improvidently effectuated by virtue of a misconstruction of *Franks* v. *Bowman*. Accordingly, *Evans* II should be reversed with appropriate directions to accomplish the dismissal of the complaint herein.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

v.

CAROLYN J. EVANS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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STATEMENT OF INTEREST AND MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

NAACP Legal Defense and Educational Fund, Inc., hereby moves for leave to file the attached brief as *amicus curiae.*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in employment discrimination litigation before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to

the Court. Consent to the filing of this brief has been granted by counsel for respondent but refused by counsel for petitioner. The proposed brief is submitted in support of respondent though advancing reasons somewhat different than those relied on by the court below and by respondent.

WHEREFORE, the NAACP Legal Defense and Educational Fund, Inc., respectfully prays that this motion be granted, and that the attached brief be filed.

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BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

ARGUMENT

This case concerns the circumstances in which the current application to an individual employee of a seniority policy which is facially neutral, but which perpetuates the effects of past discrimination against that employee, may be held to constitute a continuing violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.* Although petitioner's brief discusses at some length the statutorily prescribed time periods for filing a charge of discrimination with the Equal Employment Opportunity Commission,[1] this requirement does not appear to be at issue here; because the respondent did not file such a

[1] Prior to 1972, former section 706(d) of Title VII provided in pertinent part that a charge "shall be filed within ninety days after the alleged unlawful employment practice occurred." Section 706(e), as amended in 1972, extended this period to 180 days. 42 U.S.C. § 2000e-5(e).

charge within the applicable ninety-day time limit after the concededly unlawful [2] termination of her employment in 1968, she is forever barred from obtaining the full Title VII relief to which she would otherwise have been entitled solely as a remedy for that unlawful act. The respondent here does not seek such a remedy, but rather seeks relief from the perpetuation of the effects of the prior unlawful termination which she has suffered on a continuing basis since her re-employment by the petitioner in 1972. The issue presented by this case, then, is a narrow one: Where an employee who has been the victim of a discriminatory but previously unchallenged termination is subsequently rehired by the same employer, does the current and continuing denial of the rehired employee's previously accrued seniority rights constitute an unlawful employment practice within the meaning of Title VII?

The language of the statute indicates that this ongoing deprivation of rights is a violation. Section 703(a) not only declares that it is in general unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . .," [3] but goes on to specify that it is unlawful for an employer

> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[4]

An employer who, like the petitioner here, discharges employees because of their sex, and then later rehires them on the condition that they continue to be deprived of the

[2] Evans' employment was terminated in 1968 in accordance with United's "no-marriage" rule for stewardesses, which was held to violate Title VII in *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

[3] 42 U.S.C. § 2000e-2(a)(1).

[4] 42 U.S.C. § 2000e-2(a)(2).

seniority rights which were unlawfully taken from them in the past, is clearly engaged in an ongoing practice which violates this explicit language. Any construction of Title VII which might immunize such conduct from liability would be contrary to the statutory language and would frustrate the congressional intent "to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . ." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976).

The legislative history of the Equal Employment Opportunity Act of 1972 supports the plain meaning of the statutory language and demonstrates beyond dispute that Congress intended to prohibit not only individual acts of discrimination, but also policies which perpetuate the effects of past acts of discrimination. As the Senate Committee on Labor and Public Welfare recognized in its report:

> Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.[5]

The congressional intent to prohibit continuing violations is clearly manifested in the language of section 706(g), which was amended in 1972 to provide that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g). This provision can have no meaning

[5] S.Rep. No. 415, 92d Cong, 1st Sess, 5 (1971), quoted in *Franks* v. *Bowman Transportation Co., supra* at 765 n.21.

except in the context of a continuing violation which has been occurring over a period far in excess of the 180-day time limit for the filing of a charge prescribed by section 706(e). Within that context it is clear that, although back pay liability is limited, the continuing violation of Title VII is itself an unlawful employment practice which is subject to challenge before the EEOC and in the courts.

The implicit meaning of the back pay limitation contained in section 706(g) was made explicit in the congressional section-by-section analysis of the 1972 Act.[6] With reference to the time limits for the filing of charges, the analysis stated as follows:

> This subsection as amended [section 706(e)] provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law [former section 706(d)] have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected.[7]

Thus, it is clear from the statutory language and from the legislative history that Congress intended to outlaw

[6] The section-by-section analysis was prepared by the Senate cosponsors of the Act, Senators Williams and Javits. Senator Williams introduced it as "an analysis of H.R. 1746 as reported from the Conference. . . ." 118 Cong. Rec. 7166 (1972). The identical section-by-section analysis was introduced into the House record by Representative Perkins, 118 Cong. Rec. 7563 (1972). The Conference Committee bill was accepted by both chambers. *Id.* at 7170, 7573.

[7] 118 Cong. Rec. 7167, 7565 (1972).

present, continuing practices which perpetuate the effects of past discrimination, and that Congress intended to grant aggrieved persons the right to file charges with the EEOC—and subsequently to obtain relief from the courts—at any time during the continuing occurrence of such practices. Even in cases which have held that such a continuing violation is not established merely by the continuing nonemployment of a terminated former employee,[8] the courts have acknowledged that Title VII provides "a remedy for past actions which operate to discriminate against the complainant at the present time," and that this remedy may be available to present employees, including those on layoff status.[9] *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975) (*en banc*); *Terry* v. *Bridgeport Brass Co.*, 519 F.2d 806, 808 (7th Cir. 1975). Compare *Collins* v. *United Air Lines, Inc.*, 514 F.2d 594, 596 (9th Cir. 1975), with *Gibson* v. *Local 40, Super-*

[8] In *Electrical Workers Local 790* v. *Robbins & Myers, Inc.*, 45 U.S.L.W. 4068 (U.S. Dec. 20, 1976), this Court rejected a claim that the statutory period for filing a charge alleging a discriminatory termination could begin to run from the date of the conclusion of grievance-arbitration procedures, rather than from the date of the termination. That decision is not dispositive of the instant case. There both the parties and the courts below had assumed throughout the proceedings that the discharge was the significant occurrence, *id.* at 4069, whereas here the dispute has been focused from the beginning on the continuing denial of seniority. Moreover, in *Electrical Workers* the Court specifically noted that a different result might obtain if the terminated employee were reinstated, *id.*, which is precisely the case here. Finally, in *Electrical Workers* the Court found no express legislative history indicating the intent of Congress with respect to the effect of grievance procedures on Title VII time limits, but here there are explicit legislative materials demonstrating that Congress intended to permit the filing of a charge at any time during the ongoing occurrence of a continuing violation.

[9] Even petitioner concedes that a continuing violation may exist where there is an "ongoing seniority or other policy that properly can be said to have had its genesis in the original discriminatory practice or that was or is so inexorably tied to the former discriminatory practice as to represent merely a present extension of it." Brief for Petitioner, at 21. *Amicus* submits that this is just such a case.

cargoes & Checkers, 13 FEP Cases 997, 1004 (9th Cir. 1976).[10] The issue here is whether and to what extent the continuing violation concept applies to a case such as this, where a four year hiatus in the employment relationship has preceded the renewal of that relationship and the commencement of the continuing consequences of the past discrimination.

No prior decision of this Court directly controls the resolution of this question. The Court in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), found that under Title VII, practices which are "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. But the Court was not there confronted with any question as to the continuing nature of any unlawful practice or as to whether a charge had been timely filed in relation to the violation alleged. In *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976), the Court held that constructive seniority is ordinarily required as part of the Title VII remedy for discrimination in hiring, but the Court did not explicitly decide whether the continuing denial of seniority rights stemming from such past discrimination is itself an unlawful practice, nor did the Court have any occasion to consider the point at which a charge must be filed during the continuing occurrence of such a practice.

Nevertheless, the principles underlying these decisions are, as the court below recognized, clearly relevant to the question presented here. In every circuit which has

[10] Petitioner contends that there is a conflict between the Ninth Circuit's decision in *Collins* and the Seventh Circuit's decision in the instant case. The absence of any such conflict is conclusively demonstrated by the Ninth Circuit's specific reliance on the decision of the court below in support of its conclusion in *Gibson* that a continuing seniority preference in union work referrals "perpetrated the effects of past discriminatory practices and constituted a present violation of Title VII." 13 FEP Cases at 1004 and n.20. See *Kennan* v. *Pan American World Airways, Inc.,* 13 FEP Cases 1530, 1533 (N.D. Cal. 1976).

resolved the matter, the courts have found that facially neutral seniority practices which "freeze the status quo," preventing the victims of past discrimination from attaining their rightful place in the employment hierarchy, are themselves unlawful under Title VII.[11] This Court's decision in *Franks* clearly supports this conclusion. There the Court found that Title VII "'requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination'." 424 U.S. at 764. The Court also recognized in *Franks* that, due to the ongoing nature and effect of seniority practices, the reform of those practices "cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination . . . ." *Id.* at 768 n.28.

Thus, the *Griggs* and *Franks* decisions clearly indicate that a continuing seniority policy which perpetuates the effects of past discrimination against present employees is itself a violation of Title VII. *Amicus* submits that such a policy is unlawful not only as to persons continuously employed since the date of the first discriminatory act against them, but also as to persons who have been discriminatorily terminated and later rehired without their previously accrued seniority. A person in this latter group, in contrast to one who is unlawfully discharged and who thereafter has no further contact with the former em-

[11] See *Acha* v. *Beame,* 531 F.2d 648 (2d Cir. 1976); *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1970); *Robinson* v. *Lorillard Corp.,* 444 F.2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971); *Swint* v. *Pullman-Standard,* 539 F.2d 77 (5th Cir. 1976); *United States* v. *Papermakers Local 189,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); *EEOC* v. *Detroit Edison Co.,* 515 F.2d 301 (6th Cir.), *cert. filed,* 44 U.S.L.W. 3214 (U.S. Oct. 7, 1975); *Rogers* v. *International Paper Co.,* 510 F.2d 1340 (8th Cir.), *as modified,* 526 F.2d 722 (1975); *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1970), *cert. denied,* 404 U.S. 984 (1971); *Jones* v. *Lee Way Motor Freight,* 431 F.2d 245 (10th Cir. 1970), *cert. denied,* 401 U.S. 954 (1971).

ployer, is subjected to a renewal and an affirmative perpetuation of the effects of the original discriminatory termination. It is this active transmission of the effects of the past unlawful act into the present and future which constitutes a continuing violation of Title VII. *Kennan* v. *Pan American World Airways, Inc.*, 13 FEP Cases 1530, 1531-34 (N.D. Cal. 1976).

The application of the continuing violation concept to cases such as this does not impose on employers an affirmative duty to reinstate all discriminatorily terminated employees. A discharge followed by continuing non-employment, and even by a refusal to rehire which is not based on the discharge, does not constitute a continuing violation of Title VII; a charge of discrimination must be timely filed with relation to the date of discharge. *Collins* v. *United Air Lines, Inc., supra.* However, it is clear that a refusal to rehire which is based on the prior unlawful discharge is an act which renews the past discrimination and which constitutes a present violation of Title VII. See *Stroud* v. *Delta Airlines, Inc.*, 392 F.Supp. 1184, 1189, 1193 (N.D. Ga. 1975).[12] Similarly, the act of reinstatement without previously earned seniority, and the continuing denial of that seniority thereafter, constitute an active renewal and perpetuation of the past illegality. These affirmative acts and practices are continuing violations of Title VII; mere continuing nonemployment following an unlawful discharge is not.

The decision of the court below does not eliminate the period of limitations for Title VII actions, nor does it permit employees to resurrect time-barred claims. Where, as here, an employee has been terminated and has failed to file a charge of discrimination within the statutory

[12] Thus, contrary to petitioner's suggestion, an affirmance here would not encourage employers to adopt a policy of refusing to rehire discriminatorily terminated former employees. Such a policy would be unlawful whether or not the continuing violation concept applies to the facts of the instant case.

period following her termination, she has irretrievably lost her right to obtain reinstatement, back pay, and other relief to which she would have been entitled solely as a remedy for the unlawful termination. The subsequent renewal and perpetuation of the effects of that past discrimination did not remove the bar to her old claim; she has lost the back pay and other compensation and benefits which she could have obtained had she filed a timely charge following her termination in 1968. But, since her reemployment in 1972, she has been subjected to an active and continuing denial of her Title VII rights, and this denial gives rise to a new claim for relief which clearly is not barred by time. Although she cannot now recover the full remedy which she could have obtained for her unlawful termination had she filed a timely charge in 1968, she is entitled to relief for the present, continuing violation which has been occurring since her reemployment without seniority in 1972.[13]

The decision of the court below correctly recognizes that the continuing, affirmative perpetuation of the effects of past discrimination is itself a violation of Title VII. The statutory language, the legislative history, and the prior decisions of this Court under Title VII fully support this conclusion. Even as an employer modifies or eliminates a discriminatory policy which it has pursued in the past, it must also look to the future and review and adjust its seniority and other continuing practices to insure that the consequences of its past discrimination will not operate

[13] Similarly, in the hypothetical examples posed in the Brief for Petitioner, at 19, the employees may be barred from recovering the full relief to which they would have been entitled had they filed charges within the statutory period following the original unlawful act, but they are not barred from obtaining a remedy for the present operation of practices which have perpetuated the effects of this original discrimination for thirty years. As noted above, the employer's back pay liability would be limited to that accruing no more than two years prior to the filing of such a charge. 42 U.S.C. § 2000e-5(g). Thus, the hypothetical employees would have irretrievably lost twenty-eight years of back pay.

indefinitely to deprive its victims of their rightful place in the employment hierarchy. While employers should not be required, and are not required by the decision in this case, to answer to time-barred claims of past discrimination, the remedial purposes of Title VII mandate that employers be held accountable for their present practices which perpetuate inequality in employment opportunity due to discrimination.

CONCLUSION

For the reasons stated above, this Court is urged to affirm the decision of the court of appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

versus

CAROLYN J. EVANS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF DELTA AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., AND TRANS WORLD AIRLINES, INC., AS AMICI CURIAE

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TO: THE SUPREME COURT OF THE UNITED STATES.

COME NOW DELTA AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., AND TRANS WORLD AIRLINES, INC., hereinafter referred to as "*Amici* Airlines," and pursuant to Rule 42(3) of this Court, hereby respectfully move for an order granting leave to file the attached brief *amici curiae* on behalf of Petitioner, United Air Lines, Inc. Written con-

sent to the filing of such brief has been requested of both parties, and granted by petitioner, but refused by respondent.

APPLICANTS' INTEREST

1. Applicants are major domestic and international U.S. airlines with thousands of employees in the airline industry throughout their route systems which cover all geographic regions of the United States. The validity and ongoing efficacy of their seniority systems and the reasonable expectations of the vast majority of their employees who stand to lose seniority will be dramatically affected if there is an adverse result in this case.

2. *Amici* Airlines have been and are currently parties defendant in litigation in lower federal courts throughout the country in cases which have raised new and important questions concerning the validity of seniority systems and the existence of or non-existence of affirmative duties under Title VII. *See, e.g. Cates v. Trans World Airlines, Inc.*, 13 FEP Cases 201 (S.D.N.Y. 1976); *Stroud v. Delta Air Lines, Inc.*, 392 F. Supp. 1184 (N.D. Ga. 1975), *judgment for defendant*, Civil No. C-74-5A (N.D. Ga. March 31, 1976), *appeal docketed*, No. 76-2130, 5th Cir., May 21, 1976; *James v. Delta Air Lines, Inc.*, Civil No. C74-1676A (N.D. Ga. March 10, 1976), *appeal docketed*, No. 76-2581, 5th Cir., May 20, 1976; and *Flannigan v. Trans World Airlines, Inc.*, Civil No. 76-1113F (C.D. Cal., complaint filed April 6, 1974); *EEOC v. Delta Air Lines, Inc.*, Civil No. C76-906A (N.D. Ga., complaint filed May 24, 1976); *Kennan v. Pan American World Airways, Inc.*, Civil

No. 76-1245WHO (N.D. Cal.); *Fyfe v. Pan American World Airways, Inc.*, Civil No. 76-1273WHO (N.D. Cal.)

The actions in which *Amici* Airlines are parties involve the same general issues but in the instance of one of *Amici* the presence of a factual variation served to highlight the erroneous nature of the lower court's holding. Pan American granted seniority credit for the period of previous employment to former flight attendants whose prior terminations were allegedly discriminatory and who were later rehired. *Amici* desire to demonstrate that such a total time-in-service seniority treatment would not be valid if Respondent's theory is accepted.

3. *Amici* Airlines have been uniquely affected by judicial interpretations of Title VII which have caused the radical alteration of long standing employment practices such as the one which forms the underlying basis of this action and have a vital interest in the determination of whether the former existence of those policies, standing alone, imposes new and unforeseen duties and liabilities under Title VII. *See, e.g., Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

QUESTIONS OF FACT AND LAW WHICH HAVE NOT BEEN AND PROBABLY WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES

Amici Airlines believe that the following questions of fact and law have not been, and there is reason to

believe they will not be, adequately presented in the briefs of the parties:

1. Whether the issue is at present properly framed so as to reflect the real question before this Court, to-wit: whether Title VII imposes an affirmative duty on an employer to reinstate an employee whose discriminatory termination claim is time barred to her former position in a seniority system when the *bona fides* of that system is not under attack.

2. Whether the Court below erred in determining that the issue in this case centers around the provisions of § 703(h) of the Act when the plaintiff is not seeking the abolition or alteration of a neutral seniority system but instead affirms that system and seeks the advantages it affords.

3. Whether the Court below recognized that the Respondent was not complaining of a current affirmative policy which the Petitioner has but is, *in fact*, complaining of a policy Petitioner *does not have*.

4. Whether the failure of an employer to voluntarily grant the Title VII relief which a federal court is without jurisdiction to order gives rise to a new cause of action which would allow a federal court to grant such relief.

For the foregoing reasons, it is respectfully requested that this Court grant *Amici* Airlines leave to file a brief as *amici curiae*.

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUMMARY OF ARGUMENT

A proper resolution of the issue in this case requires first that this Court recognize what is *not* an issue in this case. *Amici* respectfully submit that the Seventh Circuit erroneously determined that the *bona fides* of United's seniority system is the determinative factor in whether Respondent is entitled to relief. The *bona fides* of that system is not at issue in this case because Respondent is not complaining of a current policy which United *has*, but is instead complaining, *in fact*, about a policy which United *does not have*. The true issue in this case is whether an employer has an affirmative and continuing duty under Title VII to "reinstate" a person terminated because of alleged dis-

crimination to her former position in the seniority roster, even though that employee never filed a timely charge with the EEOC and her Title VII claim is time-barred.

The *bona fides* of United's seniority system has not been challenged by the Respondent. She does not seek to have that system abolished or altered. Her only real claim is the time-barred one arising out of her 1968 resignation. Respondent's theory attempts to resurrect this old claim by asserting that United has a continuing duty to voluntarily provide her with a remedy that no court has jurisdiction to order, and that United's failure to fulfill this "duty" is itself a violation of Title VII. Unless Respondent's theory is recognized for what it is, the important time limitations questions in this case cannot be properly resolved.

There is no affirmative duty under Title VII to "reinstate" an individual whose prior termination may have been discriminatory, and the later re-employment of that individual does not alter this fact. "Reinstatement" is a much broader concept than mere "rehire" and assumes that for certain purposes, such as seniority status, the employee was never away. There is no logical reason to distinguish between an instance wherein "reinstatement" is demanded by a current employee and the situation wherein "reinstatement" is demanded by someone who is not a current employee. "Policies" of employers which consist solely of the *failure to have a policy* of compensating, reinstating, or otherwise remedying injuries alleged to have occurred outside of the applicable limitation period simply do not constitute continuing violations of the Act.

Adoption of the Seventh Circuit's ruling in this case would have the effect of repealing the time limits contained in Title VII. Numerous courts have recognized that the failure to voluntarily grant a possible Title VII remedy is not the type of "policy" which can support a continuing violation claim. Analogous cases arising out of the National Labor Relations Act support the absence of such a continuing duty. The basic fault with Respondent's theory is that it has no logical limitation short of repeal of the Title VII time limits. No violation would be conceivable that would not be continuing.

Though its position appears to have changed, even the EEOC has in the past acknowledged the importance of the difference between a continuing act or practice and the lingering effects of a completed act or practice. Prior EEOC interpretations have indicated that such matters as discriminatory layoffs, transfers, and discontinuances of work assignments do not constitute continuing violations. Any later inconsistent EEOC interpretation of the Act must be viewed in light of these earlier pronouncements.

This Court's opinion in the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), does not stand for the proposition that every employment system which has some tangential relationship to a prior act of discrimination is invalid. The failure of an employer to voluntarily institute programs granting special treatment to possible victims of past discrimination is not a violation of Title VII and *Griggs* did not so hold. The types of policies held illegal in *Griggs* are affirmative policies which operate as barriers to deny job

opportunities to victims of past discrimination. There is no such policy in this case.

Finally, this Court's holding in *Franks v. Bowman Transportation Co.*, ___ U.S. ___, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), does not compel a contrary result. This Court held in that case that a grant of retroactive seniority within an existing system is a permissible remedy in a timely-filed suit wherein discriminatory hiring is proved. *Franks did not* hold that an employer's failure to grant voluntarily such a remedy was itself a violation of Title VII. Indeed, this Court specifically denied such a proposition.

ARGUMENT

I.

Introduction

In November of 1966, the Respondent, Ms. Evans was first hired as a flight attendant at United Airlines.

In 1968 United maintained a policy whereby it did not allow its flight attendants to be married.

In February of 1968, Ms. Evans resigned her position as a flight attendant to be married. She filed no charge of sex discrimination with the Equal Employment Opportunity Commission within 90 days of this event.

In November of 1968, United abandoned its "no marriage" policy. Ms. Evans did not file a charge of sex discrimination within 90 days of this event.

In February of 1972, Ms. Evans was hired as a new employee at United. Her place on the seniority roster was set as of this date of hiring. She did not file a charge of sex discrimination with the EEOC within 180 days of this event.

In February of 1973, five years after her resignation and over four years after United had abandoned its no-marriage policy, Ms. Evans filed a charge of sex discrimination with the EEOC claiming United had violated Title VII of the 1964 Civil Rights Act by failing to restore her original 1966 seniority date.

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349, 88 L.Ed. 788, 792, 64 S.Ct. 582. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

Burnett v. New York Central R.R., 380 U.S. 424, 428 (1965). This case does not involve an attack on a seniority system, but instead involves an attack on these fundamental principles of fairness underlying a set of Congressionally mandated time limits.

II.

A Correct Determination Of The True Issue Is Essential To A Proper Resolution Of This Case.

Amici Airlines respectfully submit that the Seventh Circuit Court of Appeals erred in its reversal of the Trial Court's dismissal of Respondent's action. The Court of Appeals misapprehended the true issue in this case when it stated:

> The issue is whether section 2000e-2(h) [§ 703(h)[1]] may be used to interpose a legal bar to Evans' theory that the perpetuation of past discrimination through United's current seniority policy constitutes a continuing violation of her Title VII rights.

534 F.2d at 1250. *Amici* submit that neither § 703(h) nor the validity of United's current seniority system have anything to do with this case. *No current policy of United Airlines is being challenged in this case. Respondent is complaining, IN FACT, about a policy which United Airlines DOES NOT HAVE.* The real issue is whether Title VII requires an employer to affirmatively "reinstate" a former employee whose

1 Section 703(h) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(h) (1970), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

prior resignation was the result of alleged discrimination even though that employee never filed timely charges with the EEOC concerning her resignation and her Title VII claims are barred. *Amici* respectfully submit that a correct reading of Title VII reveals that no such duty exists.

A. *The Legality Or "Bona Fides" Of United's Neutral Seniority System Is Not At Issue In This Case Because The Respondent Has Not Challenged The Underlying Principle Of The System But Is Merely Seeking Reinstatement To Her Former Position Within That System.*

The Respondent in this case does not challenge the underlying principle of a seniority system.[2] She concedes that United's seniority system operates in a facially neutral manner. She does not seek to have it abolished or altered as a system. Respondent merely seeks a position within that system, which position was lost, not because of any *current* operation of the system or practice of United, but solely by reason of her 1968 resignation which she claims to have been the result of sex discrimination.[3] Instead of complaining about a policy that United currently applies, Respon-

2 For cases in which the seniority system was in fact challenged, see note 17 *infra*.

3 Of course, Ms. Evans would not have a case under any theory unless Sprogis v. United Air Lines, Inc. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), is good law. This Court has never addressed some of the interesting issues raised by that case. *See id.* at 1202 (Stevens, J., dissenting). Those issues are not properly before this Court at the motion to dismiss stage because they go to the merits of Ms. Evans' claim and this Court must first determine whether the trial court has jurisdiction to hear that claim.

dent in reality is complaining about an *additional* policy that United does *not* have — a policy of automatically reinstating to their former seniority positions the possible victims of alleged prior discrimination. Judge Cummings in his original dissent recognized exactly this fact:

> The gravamen of the complaint is that United has continued to fail to credit plaintiff with prior seniority.

Evans v. United Air Lines, Inc., 12 FEP Cases 288, 291 (7th Cir. Jan. 29, 1976). Respondent does not seek to have United abandon its current policy, but instead seeks to force United to adopt this *additional* policy. Therefore, whether § 703(h) protects neutral seniority systems is irrelevant to this case because Respondent is simply not attacking the existing system.

The lower court's opinion confused the issue further by comparing continuous time-in-service seniority systems with total time-in-service systems, as if this were the basis of the controversy in this case.[4] 534 F.2d at 1250. Respondent's claim, however, would be satisfied under neither system. What Respondent seeks is the reinstatement of her November 1966 seniority date. A shift to a total time-in-service system would not give her this. She is seeking not only the

4 It is clear that Ms. Evans is seeking reinstatement of her original 1966 seniority date. 534 F.2d at 1248. Indeed this reinstatement request formed the basis for Judge Cummings' dissent from the first opinion in the Court of Appeals. He stated:

> This is a current practice of defendant and results in plaintiff's receiving less seniority than male stewards hired between her February 1968 illegally forced resignation and her February 1972 reemployment.

12 FEP Cases 288, 291 (7th Cir. Jan. 29, 1976).

seniority she accrued while she actually worked for United but also the seniority she claims she would have accrued from her resignation in 1968 until she returned to work.[4.1] She lost both her original seniority date and the continuity of her time-in-service in February 1968 when she resigned. *Five years later* she commenced these proceedings, not in order to alter or abolish United's current seniority system, but to obtain a stepped-up position in it.

B. Recognition That Respondent's Claim Turns On Whether Title VII Imposes An Affirmative Duty To Reinstate Victims Of Prior Discrimination Is Essential To The Resolution Of The Important Time Limitations Questions In This Case.

The timely filing of a charge with the EEOC is a jurisdictional prerequisite to the subsequent maintenance of an action based on Title VII. *E.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968). In 1968, when Respondent resigned, the law required that the EEOC charge be filed within

4.1 In fact, one of *Amici*, provides total time-in-service treatment to former flight attendants whose prior terminations were allegedly discriminatory. This practice is currently being challenged in lower federal courts under the same theory that Respondent's present here. *See* Applicant's Interest *supra*. Under Respondent's theory, a total time-in-service policy would also be subject to attack because it would not give Ms. Evans credit for the period between 1968 and 1972 when she did not work for United. Moreover, such a policy would give no credit to the new employee who, although he never worked for his employer previously, claims that this prior non-employment was due to an act or acts of alleged discrimination about which he never filed a charge.

90 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(d) (1970), as *amended*, 42 U.S.C. § 2000e-5(e) (Supp. II 1973)[5] (extending time limit to 180 days). Respondent, however, waited until five years after she lost her position and four years after United had discontinued its no-marriage policy before she filed her charge with the EEOC. *Therefore, whether her case is based on the resignation in 1968 or on the policy abandoned that same year it is clearly time-barred.* Consequently, whether Respondent has a valid claim under Title VII depends entirely upon whether some *current* United policy violates Title VII, as she apparently concedes. 534 F.2d at 1249.

As discussed above, Respondent is not challenging United seniority system. Instead, she wishes to be reinstated to her former position within it. Therefore, the only current "policy" of United which Respondent is challenging here is United's *failure to have a policy* of reinstating the possible victims of alleged past discrimination to their former positions. That Ms. Evans' claim is in fact a "reinstatement" one is made clear by the following hypothetical. Suppose another former

5 Section 706(e) of Title VII, as amended by § 4(a) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 200e-5(e), provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

United flight attendant resigned because of the now abandoned policy in 1968 and likewise failed to file a timely charge with the EEOC. Today, she approaches United, not requesting to be hired, but demanding to be reinstated in her former position with a seniority date running from the time she was *first* hired. Would United have a duty under Title VII to so reinstate her? Only if such a duty exists does Ms. Evans have a claim. *There is no reason to distinguish between an instance wherein "reinstatement" is demanded by a current employee and the situation wherein "reinstatement" is demanded by someone who is not a current employee.*[6]

Under Title VII United had a duty to consider Ms. Evans' application for employment in 1972 on its merits and not discriminate against her on the basis of one of the proscribed classifications under the Act. This United clearly did and Ms. Evans was hired. She was "re-hired" only in the sense that she was at one time in the past a United employee the same as if she had voluntarily left United to take other employment in 1968 and later returned. What she is now demanding is to be "reinstated" to her former position. Reinstatement is entirely different from "rehire" in this context and in effect says that for certain purposes, such as seniority, the employee was never away.

6 For example, in Kennedy v. Braniff Airways, Inc., 403 F. Supp. 707, 709 n.2 (N.D. Tex. 1975), the court stated:

> It has been suggested that the continuing violation doctrine could be limited to present employees. . . . This possible limitation would serve to distinguish many of the cases the court has cited. The ultimate question is whether the distinction warrants the vast difference in treatment requested by the plaintiffs. This court has been unable to justify the delineation except on the practical grounds that it would reduce the number of possible claims.

There is no "continuing duty to reinstate" someone who may have been discriminatorily discharged under Title VII,[7] and Ms. Evans' 1972 hiring by United does not alter this fact.

Amici Airlines submit that the fact that Respondent is seeking reinstatement within United's current system rather than the abolition or alteration of that system should be crucial to the outcome of this case. The gravamen of Respondent's complaint is that United discriminatorily dislodged her from her position in 1968 and currently refuses to reinstate her to that same position. The validity of United's current seniority system is simply not at issue.

This view of the true issue in this case clearly reveals that Respondent's continuing violation argument is groundless. As discussed in depth in the next section, a finding of a continuing violation in this case would violate the elementary principles of law underlying statutes of limitations in every field, including Title VII. "Policies" of defendants which consist solely of refusing to compensate, reinstate, make restitution, or otherwise remedy injuries alleged to have occurred outside of the applicable statute of limitations simply do not constitute continuing violations or otherwise toll the statute.

III.

Title VII Imposes No Duty On An Employer To Reinstate A Victim Of Alleged Prior Discrimination To Her Former Position Within A

7 See cases cited in Part III A *infra*.

Neutral Seniority System In The Absence Of A Timely Suit Brought On The Prior Discrimination.

Remedies are the province of the judiciary. The proving of a claim in a timely-filed suit gives the court jurisdiction to order an appropriate remedy. In this case, Respondent concedes that the court has no jurisdiction to grant the remedy she seeks ("reinstatement") if her suit is grounded either on her 1968 resignation or the policy change in 1968. 534 F.2d at 1249. However, Respondent in essence asserts that the failure of United to grant this remedy voluntarily is itself a violation of Title VII. Therefore, according to Respondent the court *does* have jurisdiction to order the remedy based on her 1968 resignation. Under Respondent's bootstrap theory, an employer's simple refusal to grant a time-barred remedy is elevated to the status of a current "policy" which perpetuates past discrimination and which consequently rejuvenates the court's jurisdiction to order the remedy after all.

A. *The Congressionally Mandated Time Limits In Section 706(e) Of Title VII Will Be Judicially Repealed If Respondent's Theory Is Adopted.*

Respondent argues that a continuing violation is present in her case and that therefore the time limits in § 706(e) do not apply so long as the challenged "policy" persists. Respondent's case does not present a continuing violation because the policy that resulted in Respondent's termination was abandoned years before a charge was filed and the only present "policy" is United's refusal to reinstate her to her former sen-

iority position which was lost by reason of her 1968 resignation. This Court is required to find that "inaction" alone is a "continuous policy" which is subject to challenge so long as the inaction persists.

In all of the leading cases in which a true continuing violation was found, the plaintiffs challenged affirmative employment policies and sought to have those policies abolished or substantially altered. Here Respondent is *not challenging* United's current seniority system but is merely seeking to obtain a higher position within that system. The essence of her grievance is that United has failed to adopt an *additional* policy, that of voluntarily granting the victims of alleged past discrimination a full remedy without requiring those persons to file suit on the original violation.

Numerous courts have recognized that this failure to grant a remedy is not the type of "policy" which can support a continuing violation claim. For example, in *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232 (N.D. Ga. 1969), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970),[8] the plaintiff claimed that the employer had illegally denied him a promotion and that this violation was continuing because the employer had not yet placed the plaintiff in his rightful position. The court rejected this claim and stated:

> There is no known authority to the effect that a *failure to rectify* an alleged unlawful act converts it into a continuing transaction or suspends the 90-day period.

8 The Fifth Circuit reversed on the ground that the plaintiff's resort to arbitration under a collective bargaining agreement tolled the statute of limitations.

296 F. Supp. at 1235 (emphasis supplied). Again, in *Collins v. United Air Lines, Inc.*, 514 F.2d 594 (9th Cir. 1975), the court was faced with a situation identical to the case at bar except that Ms. Collins had never been rehired. She attacked United's "policy" of failing to reinstate her as a continuing violation, but the court held the claim time-barred and stated:

> In this context, a request for reinstatement is wholly different from a new application for employment — it seeks to redress the original termination.

Id. at 596. In *Kennedy v. Braniff Airways, Inc.*, 403 F. Supp. 707, 709 (N.D. Tex. 1975), an employer's "refusal to restore seniority rights" was held not to be a continuing violation. Many other cases involving employment discrimination agree that such "policies" as a refusal to restore seniority rights, a failure to rectify an alleged unlawful act, or a refusal to reinstate do not constitute additional violations.[9]

It is consistent with national labor policy to have time limits on complaints arising in the employment

9 *E.g.*, Smith v. OEO for Arkansas, 538 F.2d 226 (8th Cir. 1976) (discriminatory refusal to hire not continuing); Terry v. Bridgeport Brass Co., 519 F.2d 806 (7th Cir. 1975) (refusal to accept recall which results in loss of seniority not continuing); Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (en banc) (failure to reinstate after termination not continuing); Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973) (under 42 U.S.C. § 1981, layoff is not continuing); Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972) (failure to promote not continuing unless employee is discriminatorily passed over in future promotions); Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176 (N.D. Ga. 1975) (demotion not continuing); Buckingham v. United Air Lines, Inc., 11 FEP Cases 344 (C.D. Cal. 1975) (terminations and transfers not continuing).

context. Cases under § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), involve similar issues. This Court has often drawn on this source to aid in the interpretation of analogous Title VII provisions.[10] In *NLRB v. Textile Machine Works, Inc.*, 214 F.2d 929 (3d Cir. 1954), the court ruled that an employer's refusal to reinstate employees illegally fired for striking did not itself constitute a new violation. The court analyzed a demand for reinstatement as follows:

> A discharged employee who seeks to be *reinstated* is really litigating the unfairness of his original discharge because only if the original discharge was discriminatory is he entitled to be reinstated as if he had never ceased working for the employer. The word *reinstatement* must be employed in this connection as the equivalent of uninterrupted employment. In this sense, the employee is restored to all of the rights and privileges which were his before he was discharged, *plus any new rights and privileges which would have accrued to him in the meantime* . . . .

Id. at 932 (emphasis supplied). In the case at bar Respondent is seeking precisely those rights which the *Textile Works* court defined as "reinstatement" — the restoration of old rights plus additional rights that would have accrued had she not resigned. *See also, NLRB v. McCready and Sons, Inc.*, 482 F.2d 872, 874-75 (6th Cir. 1973); and *American Federation of Grain Millers v. NLRB*, 197 F.2d 451 (5th Cir. 1952).

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10 *E.g.*, Franks v. Bowman Transportation Co., ___ U.S. ___, 96 S. Ct. 1251, 47 L. Ed. 2d 444, 464 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419-21 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803-04 (1973).

The question of whether a prior unfair labor practice so taints a current neutral practice as to render it unlawful was addressed by this Court in *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960). There, this Court analyzed the two possible uses of a time-barred unfair labor practice to prove a current violation:

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Id. at 416-17. It was the second use that this Court refused to permit.

In the case of *NLRB v. Childs Co.*, 195 F.2d 617 (2d Cir. 1952), an employee who was terminated illegally but who failed to file a timely charge with the NLRB demanded reinstatement to his position with back seniority. The court held that his claim was time-barred even though his demand for reinstatement had been made and refused within the limitation period. The court stated regarding the employee's demand:

> It conclusively shows that he was at all times seeking reinstatement to his former rights and not merely new employment. As we have already said, restoration to these rights was barred by failure to file his charge in time and therefore the Company was not required to accede to his demand.

Id. at 621. The plaintiff in *Childs* occupied precisely the same position as Ms. Evans does in this case, except that Ms. Evans accepted reemployment with United before bringing her claim for "reinstatement."

The distinctions that these cases on continuing violations make between a plaintiff's attack on current, affirmative employment policies on the one hand and a complaint based on the simple failure of an employer to erase the effects of a past act on the other is crucial if the time limits contained in § 706(e) are to be given any effect.

The court below, in its original opinion[11] delivered in this case prior to rehearing, recognized that the adoption of Respondent's theory would result in undermining the policies expressed in § 706(e). The court quoted[12] from *Collins v. United Air Lines, Inc.*, 514 F.2d

11 12 FEP Cases 288 (7th Cir. Jan. 29, 1976).
12 *Id.* at 290.

594, 596 (9th Cir. 1975), a *case identical with Evans except for the fact that Ms. Collins, unlike Ms. Evans, was never rehired:*

> We cannot accept Collins' argument that her continuing nonemployment as a stewardess resulting from the alleged unlawful practice is itself a violation of the Act. Under the statute, *it is the alleged unlawful act or practice — not merely its effects* — which must have occurred within the 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period.

(Emphasis supplied). Other courts dealing with alleged continuing violations have recognized this as well. *E.g., Terry v. Bridgeport Brass Co.*, 519 F.2d 806, 808 (7th Cir. 1975); *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975) (en banc); *Kennedy v. Braniff Airways, Inc.*, 403 F. Supp. 707, 709 (N.D. Tex. 1975).

There is simply no logical limit to Respondent's theory short of judicial repeal of § 706(e). All violations would be continuing. An illegal termination, as in *Collins*, could not qualify as a completed act under Respondent's theory. In such a case, the complaining individual could simply attack the employer's current "policy" of failing to reinstate her to her former position. The fact that Ms. Evans was rehired and Ms. Collins was not should make no difference.[13]

13 See note 6 and accompanying text *supra*.

Although the EEOC's position appears to change on these matters,[14] it has in the past acknowledged the importance of the difference between a continuing act or practice and the tangential effects of a completed act or practice. In a General Council Opinion Letter dated January 11, 1966, the EEOC stated:

> A layoff is not a continuing act and, accordingly, a charge alleging a discriminatory layoff must be filed within 90 days of the layoff . . . The fact that some aspects of the employment relationship, such as recall rights, may continue beyond the date of the layoff is immaterial.

EEOC, Office of the General Counsel, Digest of Legal Interpretations Issued or Adopted by the Commission (January 1, 1966 through March 31, 1966), page 9. Similar rulings were made with regard to discriminatory transfer and discriminatory discontinuance of work assignment. *EEOC, Office of the General Council, Digest of Legal Interpretations Issued or Adopted by the Commission*, (October 9, 1965 through December 31, 1965), page 22. These interpretations of the Commission are entitled to weight in this Court's consideration of this case, and later, contrary positions should be viewed in light of these earlier

14 The EEOC found Ms. Evans' charge to be timely filed. 12 FEP Cases at 292. Apparently EEOC now takes the position that an affirmative duty to reinstate does exist. For example in a suit recently filed against one of *Amici* Airlines the EEOC has alleged violation of the Act as follows:

> (d) failing and refusing to reinstate females discharged due to marriage because of their sex;
> (e) failing and refusing to reinstate females discharged due to pregnancy because of their sex; . . .

EEOC v. Delta Air Lines, Inc., Civil No. C76-906A (N.D. Ga., Complaint filed May 24, 1976).

pronouncements. *General Electric Co. v. Gilbert*, ___ U.S. ___, 45 U.S.L.W. 4031, 4036 (U.S. Dec. 7, 1976).

Acceptance of Respondent's and the EEOC's theory of a continuing duty to rectify any past discrimination requires the judicial repeal of § 706(e) of the Act. Only if this Court is willing to ignore the Congressional purpose[15] underlying that section is such a result possible.

B. *There Is No Employment Policy In This Case Which Illegally Perpetuates The Effects Of Past Discrimination.*

The Court of Appeals characterized United's seniority policy as "an instrument that extends the impact of past discrimination, albeit unintentionally." 534 F.2d at 1250. Consequently, relying on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the court ruled that United's current seniority system itself violates Title VII, thereby rendering Respondent's claim timely.

15 This purpose was described by the Court in Cisson v. Lockheed-Georgia Co., 392 F. Supp. 1176, 1182 (N.D. Ga. 1975), as follows:

> [W]hen over-liberal interpretations of EEOC complaints would actually frustrate the intent of Title VII, such interpretations should be rejected. Thus, this court rejects the argument espoused by plaintiff herein that whenever the term "continuing" is inserted in an EEOC complaint, the court and the EEOC should assume that the plaintiff actually desires to raise claims of discriminatory failure to rehire, repromote, or retransfer, rather than the discharge or demotion claim actually asserted. Such a rule would permit the bypass of orderly EEOC procedures whenever a layoff or discharge occurs and would completely frustrate the purpose of Title VII to foster conciliation by the parties rather than judicial confrontation.

Griggs, however, is inapposite. The testing and educational requirements struck down in *Griggs* were affirmative programs that actively perpetuated the effects of past discrimination and programs that the plaintiffs sought to abolish. *Griggs* did *not* say that every employer violates Title VII unless it voluntarily institutes affirmative programs to grant special treatment to victims of past discrimination. Indeed, § 703(j) of Title VII would appear to forbid such a result.[16]

The continuing violation cases discussed above recognize that a failure to remedy is not the same as an active system which the plaintiff seeks to abolish.[17] A

16 Section 703(j) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(j) (1970), provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

17 Of course, there can be valid challenges to seniority systems under *Griggs*. This is best illustrated by the numerous cases involving job, departmental, or line-of-progression seniority systems in which the employer adopts facially neutral rules restricting transfer from one job, department, or line-of-profression to another. Where divisions were formerly segregated, these restrictions tend to perpetuate the effects of past discrimination and might consequently be unlawful under *Griggs* in certain circumstances. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973). These cases, however, are inapposite to Ms. Evans' case. She is not challenging the structure of United's seniority system, but is merely seeking reinstatement within it.

hypothetical will serve to illustrate how *Griggs* is in harmony with this distinction. Suppose an employee is discriminatorily denied a salary increase at one point in his career. Thereafter, he receives increases regularly without discrimination except that his salary level is always one notch below the level he would have had but for the past discriminatory act. Without more, *Griggs* does not require a finding that the employer currently violates Title VII — a simple failure to remedy will not support an action. On the other hand, if the employer were to adopt a policy which states that any employee who has ever been denied a salary increase may never again be considered for further increases, then a case under *Griggs* might be presented. The employer might be compelled to abandon this policy in that it actively continues the effects of the past discrimination into the future.

Griggs should not be extended so as to invalidate any neutral seniority system which has no provision granting special treatment to possible victims of some prior discrimination.

The most obvious defect of the seniority systems which would be left after such an extension is the total absence of any way to administer them fairly. Who would choose which individuals are entitled to extra credit? How would such a system decide which of all former employees were discriminatorily discharged nine or ten years prior to rehire and which were discharged for non-discriminatory reasons? Since one of the basic theories underlying statutes of limitations is the inability of a court to have fresh evidence from wit-

nesses whose memories have faded by the lapse of time, how could an employer be expected to make better decisions? Should the system then grant back seniority to all prior employees regardless of the reason for their terminations?

There is nothing in Title VII to require an employer and its employees to give favored treatment to former workers who were terminated for sloth, theft, or incompetence or who left one company because they thought better opportunities lay elsewhere. *Amici* urge this Court not to take such a step.

C. The Court of Appeals Erred In Ruling That This Court's Opinion In Franks v. Bowman Transportation *Compels A Contrary Result.*

In *Franks v. Bowman Transportation Co.*, ___ U.S. ___, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976), this Court held that a grant of retroactive seniority was a permissible *remedy* in a timely-filed suit alleging discriminatory hiring. *Franks* did *not* hold that an employer's failure to grant voluntarily such a remedy was itself a violation of Title VII. Indeed, the Court specifically denied this proposition:

> The underlying legal wrong affecting them [plaintiffs] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they

> would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire.

47 L. Ed. 2d at 458.

Ms. Evans likewise does not ask for "modification or elimination of the existing seniority system" but only for reinstatement to her former status within it. As the *Franks* opinion indicates, the underlying alleged legal wrong is not United's current system, but is Ms. Evans' resignation in 1968.

This Court in *Franks* did not address itself to the *bona fides* of the seniority system in that case *because that was not an issue.* This Court simply held that § 703(h) did not bar the grant of retroactive seniority within an existing system once a timely-brought claim of hiring discrimination was presented. This Court did *not* view a discriminatory hiring practice as somehow invalidating a company's seniority system. This Court in effect affirmed the validity of Bowman Transportation Company's seniority system by placing the individual discriminatees within their rightful places in that system. Section 703(h) was examined only to see what effect, if any, it had to bar the relief of retroactive seniority after a proven act of discrimination. As the above quoted language from that case makes clear, this Court scrupulously avoided the question of whether the seniority system in effect at Bowman Transportation Company was a *bona fide* one.

Had Ms. Evans timely challenged her 1968 termination, *Franks* would stand for the proposition that § 703(h) does not bar the grant of retroactive seniority as a proper remedy. Of course, no court has jurisdiction to determine whether Ms. Evans' 1968 resignation was the result of discrimination or whether she would have resigned even without the existence of the "no-marriage" rule. The evidence underlying that crucial factual question is now eight years old, and any chance for United to fairly rebut her allegations have gone with the passage of time. A ruling which requires United to attempt to overcome this burden is patently unfair and offends even the most elementary notions of due process.

In sum, if the possible existence of a single event of post Act discrimination works to invalidate an entire seniority system, it is doubtful that there exists a valid seniority system anywhere in this country. This Court's decision in *Franks* did not even approach such a result.

CONCLUSION

For the foregoing reasons it is urged that this Court should reverse the decision of Seventh Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the above and foregoing have been served on Petitioner and Respondent by depositing same in the United States mail, postage prepaid, properly addressed this ____ day of December, 1976.

GORDON DEAN BOOTH, JR.

UNITED AIRLINES

December 13, 1976

J. Stanley Hawkins, Esquire
Troutman, Sanders, Lockerman
& Ashmore
1400 Candler Building
Atlanta, Georgia 30303

Re: United Air Lines, Inc. v. Carolyn J. Evans, Supreme Court of the United States, Case No. 76-333.

Dear Mr. Hawkins:

Pursuant to your request, United Air Lines, Inc. hereby consents to the filing of a brief *amici curiae* in the subject case by Delta Air Lines, Inc. and Trans World Airlines, Inc.

Thank you very much.

Yours very truly,

/s/ EARL G. DOLAN
Earl G. Dolan
Attorney for United Air Lines, Inc.

EGD:mf